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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1089

KERR COUNTY LAND COMPANY,

Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 12, 1973
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1059

KERN COUNTY LAND COMPANY,

Petitioner.

v.

OCCIDENTAL PETROLEUM CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

List of Relevant Docket Entries

In the District Court

Date	Proceedings
October 17, 1967	Complaint.
November 8, 1967	Filed summons and return, served Occidental Petroleum Corp. by B. Rothman of Phillips, Nizer, et al. 11-1-67.
February 29, 1968	Filed Amended and Supplemental Complaint.
April 26, 1968	Filed answer to complaint and counterclaim.
May 15, 1968	Filed pltff's reply to counterclaims.

Date	Proceedings
May 19, 1968	Filed order that the above entitled action is referred to Herlands, J. for all purposes—Sugarman, Ch. J. mn.
October 14, 1969	Filed order referring action to Palmieri, J. for all purposes—Sugarman, Ch. J. m/n.
November 21, 1969	Filed deft. amended answer and counterclaim to amended complaint.
December 18, 1969	Filed deft's (Kern County) answer to counterclaim and pltff.
May 12, 1970	Filed pltff's affdvt, statement & notice of motion for summary judgment before Palmieri, J. at a time & place to be fixed by Court.
June 1, 1970	Filed pltffs' memorandum of law in opposition to deft Occidental's motion for summary judgment.
June 1, 1970	Filed memorandum of law of the Intervenor in partial opposition to motion for summary judgment.
June 1, 1970	Filed affdvt of Benedict Wolf (for Abrams, intervenor in action No. 3) in opposition to portion of summary judgment motion of pltff in action No. 3.
June 1, 1970	Filed opposing statement of Stephen Abrams pursuant to Rule 9g on behalf of pltffs' in actions 1, 2, 4, & pltff intervenor in action No. 3.
June 1, 1970	Filed Intervenor's statement pursuant to Rule 9g in action No. 3.

Date	Proceedings
June 1, 1970	Filed affdvt of Benedict Wolf (for pltffs' & intervenor-pltff) in opposition to deft Occidental Petroleum Corp's cross motion for summary judg.
June 16, 1970	Filed reply affdvt of Benedict Wolf (for pltffs) to affdvts. submitted by Occidental Petroleum Corp. in opposition to pltffs' motion for summary judgment.
June 16, 1970	Filed pltffs' reply memorandum in actions Nos. 1, 2 & 4 in support of motion for summary Judg.
June 18, 1970	Filed deposition of deft Occidental Petroleum by Armand Hammer taken by pltff on 4-15-69 m/n.
June 18, 1970	Filed continued deposition of Occidental Petroleum by Armand Hammer taken by pltff on 4-16 m/n
June 18, 1970	Filed one envelope containing exhibits.
July 1, 1970	Filed supplementary memorandum.
November 27, 1970	Filed pltff Kern County Land Co. affdvt & notice of motion for summary judgment against deft Occidental Petroleum Corp. on all four causes of action etc.
November 27, 1970	Filed memo endorsed on motion filed this date—Motion granted in part & denied in part—See opinion dated 11-27-70—Palmieri, J.

Date	Proceedings
November 27, 1970	Filed deft Occidental Petroleum Corp. affdvt & notice of motion to dismiss claims of all pltffs' & intervenor pltff etc.
November 27, 1970	Filed memo endorsed on motion filed this date—Motion denied—See opinion dated 11-27-70—Palmieri, J. (Filed in 67-2858.)
November 27, 1970	Filed Opinion #37207—Kern's motion for summary judgment is granted. Judgment is awarded against Occidental Petroleum Corp. for $17,712,980 with interest at rate of 6% per annum as indicated —Decision on the recovery of dividends is reserved as set forth herein—Motions of the pltff stockholders in actions Nos. 1, 2 & 4 are denied, solely because they are deemed moot in light of recovery awarded to New Kern—Motions of deft Occidental are denied with prejudice—It is intention of the Court to direct entry of final judgment upon the disposition of the dividend issues—Palmieri, J. m/n (Filed in 67-2858)
December 29, 1970	Filed affdvt of David R. Hyde (for Tenneco Inc. & Kern County Land Co.) in support of Kern's position that it is entitled to dividends (Filed in 67-2858).
December 29, 1970	Filed pltff Kern County Land Co. supplemental memorandum (Filed in 67-4042).

Date	Proceedings
December 29, 1970	Filed pltffs' (in actions 1, 2, & 4) supplemental memorandum of law (Filed in 67-2858)
January 27, 1971	Filed OPINION #37354—Judgment is awarded to New Kern in the amt. of $1,793,439.22 interest on $575,671.85 to run from 9-21-67 & interest on $1,217,767.37 to run from 1-9-68. This Court is disposed to direct the entry of a final judg. Parties are given 15 days from date of this decision to submit briefs setting forth any reasons why a final judg. should not be entered & particularly, whether the 4th, 5th & 6th counterclaims asserted by Occidental should bar the express direction of finality contemplated by Fed. R. Civ. P. 54b—So ordered—Palmieri, J. m/n (Filed in 67-2858).
February 18, 1971	Filed deft Occidental Petroleum Corp. affdvt & notice of motion to stay enforcement of the Final Judg. (Filed in 68-2858.)
February 18, 1971	Filed deft's memorandum in support of its application staying enforcement of any final judgment ent. by court by bond (Filed in 68-2858).
February 18, 1971	Filed affdvt of Simon Rose (for deft Occidental) in answer to affdvt of David Hyde.

Date	Proceedings
February 18, 1971	Filed affdvt of Benedict Wolf (for pltffs' in actions Nos. 1, 2 & 4) in favor of entry of final judg. (Filed in 68-2858).
February 18, 1971	Filed memo endorsed on motion filed this date—Motion denied—See Opinion of 2-18-71.
February 18, 1971	Filed pltff Kern County Land Co. memorandum in support of proposed judgment.
February 18, 1971	Filed copy of KCL memorandum in support of proposed judgment.
February 18, 1971	Filed copy of KCL memorandum in support of proposed judgment.
February 18, 1971	Filed affdvt of David R. Hyde (for pltff KCL Corp.) in support of New Kern's proposed judg.
February 18, 1971	Filed affdvt (copy) of David Hyde (for pltff KCL Corp.) in support of New Kern's proposed judg.
February 18, 1971	Filed Opinion #37420—Judgments are filed herewith in the New Kern case & in companion cases (see entry in 68-2858)—Palmieri, J. m/n.
February 18, 1971	Filed Judgment #71,305—Ordered that pltff KCL Co. recover of Deft Occidental Petroleum Corp. the sum of $19,506,419.22 with pre-judgment interest to date at rate of 6% per annum as follows: on $886,623 from 6-2-67 amounting to $197,632.89; (2) on $7,979,607.00

Date	Proceedings
	from 6-9-67, amounting to $1,769,-506.14; (3) on $575,671.85 from 9-21-67 amounting to $117,815.43; (4) on $8,846,750.00 from 12-11-67 amounting to $1,692,758.94; (5) on $1,217,767.37 from 1-9-68 amounting to $227,205.32 for a total recovery of $23,511,337.94 together with post-judgment interest thereon from the date of entry of this judgment at rate of 7½%. Pursuant to Rule 62d a stay of this judgment is granted pending the disposition of the appeal of the 16b issues only & on the following conditions: that Occidental file its notice of appeal within 10 days of the filing of this judgment; that Occidental post a supersedeas bond in sum of 1 million dollars & it is ordered that pltff KCL Corp. & defts' to counterclaims have judgment against deft Occidental dismissing the first, second, third & seventh counterclaims asserted in the amended answer of deft Occidental & it is ordered that the intervenor's complaint of Stephen Abrams is dismissed as moot—Palmieri, J. Judg. ent-Clerk m/n. ENT 2-19-71.
February 22, 1971	Filed Opinion #37428—To avoid any possible misunderstanding regarding the judgment rendered in this matter on 2-18-71, this memorandum, to be considered a supple-

Date	Proceedings
	mental to the opinion of the court filed on 2-18-71, is intended to make clear that the court's rejection of a proposed judgment reserving its jurisdiction over attys' fees must not be understood to be a decision as to the merits of that issue. It was not thought necessary to make an express reservation of decision as to attys. fees since the court retains jurisdiction of this litigation for all purposes pursuant to individual assignment program—Palmieri, J m/n.
February 26, 1971	Filed Supersedeas Bond—1 Million dollars—Firemen's Insurance Co. of Newark, New Jersey.
February 26, 1971	Filed deft Occidental Petroleum Corp. notice of appeal to USCA from each & every part of the 4 judgments of 2-18-71—Mailed copies to Cahill, Gordon, Sonnett, Reindel & Ohl; Davis, Pold & Wardwell.
March 15, 1968	Filed in Court reply affdvt of David R. Hyde (for defts' Tenneco Inc. & KCL Corp.) to affdvt of Benedict Wolf.
March 15, 1968	Filed in Court affdvt of Abraham L. Pomerantz (for pltff Colonial Realty Corp) in support of designation of lead counsel.
March 15, 1968	Filed in Court affdvt of Stanley Kaufman (for pltff in action No. 2) in partial opposition to deft Occidental's motion to consolidate.

Date	Proceedings
May 14, 1970	Filed pltff Abrams memorandum of law in support of its motion for summary judgment.
June 15, 1970	Filed reply affdvt of David Hyde in support of New Kern's motion for summary judgment.
June 15, 1970	Filed pltff Kern County Land Co. reply to deft's memorandum opposing & the memorandum of pltff-intervenor Abrams opposing in part, New Kern's motion for summary judgment.
March 15, 1971	Filed deft Occidental's statement pursuant to Rule 9g.
March 15, 1971	Filed opposing affdvt of Simon Rose (for deft Occidental) to motion for summary judg.
March 15, 1971	Filed affdvt of Richard J. Archer (for deft Occidental) in opposition to mot. summ. judg.
March 15, 1971	Filed deft's response to pltffs' Rule 9g statement in actions Nos. 1, 2 & 4.
March 15, 1971	Filed Kern County Land Co. statement pursuant to Rule 9g.
March 15, 1971	Filed deft Occidental Petroleum Corp. memorandum in opposition to motion of pltffs' for summary judgment.
March 15, 1971	Filed deft Occidental's memorandum in support of its cross-motion to dismiss claims.

Date	Proceedings
March 15, 1971	Filed deft Occidental petroleum Corp. reply memorandum in support of its cross-motion.
March 15, 1968	Filed in Court reply affdvt of Benedict Wolf to affdvt of David R. Hyde & to grant motion for intervention.
March 15, 1971	Filed deft's (Occidental) response to Rule 9g statement of pltff New Kern.
April 5, 1971	Filed notice of certification of record on appeal to USCA.
	In the Court of Appeals
March 2, 1971	Filed copies of four (4) statements of docket entries and four (4) copies of notice of appeal (Occidental Petroleum Corp.).
April 5, 1971	Filed record (original papers of district court) (& in 71-1274-5-6).
May 6, 1971	Filed order extending time to file appellant's brief & joint appendix to 6-15-71; appellees brief by 8-16-71; appellant's reply brief by 9-13-71; argument to be heard during week of 9-20-71 (& in 71-1274-5-6).
June 11, 1971	Filed application and order (endorsed) granting leave to file appellant's brief not to exceed 122 pages (Occidental Petroleum) (& in 71-1274-71-1275-6).

Date	Proceedings
June 15, 1971	Filed joint appendix (Vols I thru III) (& in 71-1274-5-6).
June 15, 1971	Filed brief, appellant with proof of service (& in 71-1274-5-6).
August 13, 1971	Filed application and order (endorsed) granting leave to file appellees' brief not to exceed 95 pages (& in 71-1274-5-6).
August 16, 1971	Filed brief, appellees (Kern County Land Co., et al.) with proof of service (& in 71-1274-5-6).
September 13, 1971	Filed order granting leave to file appellant's reply brief not in excess of 49 pages (& in 71-1274-5-6).
September 13, 1971	Filed reply brief, appellant with proof of service (& in 71-1274-5-6).
September 21, 1971	Argument heard (by: Friendly ChJ, Moore & Timbers CJJ) (& in 72-1274 71-1275-6).
October 13, 1971	Judgment Reversed with instructions to dismiss, Friendly, CJ (& in 71-1274-5-6).
October 13, 1971	Filed judgments (& in 71-1274-5-6).
October 22, 1971	Filed itemized and verified bill of costs with proof of service (& in 71-1274-5-6).
October 26, 1971	Filed motion for leave to file petition for rehearing or rehearing in banc (Kern County, etc.) (& in 71-1274-5-6).

Date	Proceedings
October 27, 1971	Filed order granting motion for leave to file petition for rehearing and rehearing in banc (& in 71-1274-5-6) with proof of service.
October 27, 1971	Filed petition for rehearing and rehearing in banc with p/service (& in 71-1274-5-6).
November 19, 1971	Filed order denying petition for rehearing (& in 71-1274-5-6).
November 19, 1971	Filed order denying petition for rehearing in banc (& in 71-1274-5-6).
December 21, 1971	Issued mandates (3) opinion, judgments and statement of costs (& in 71-1274-5-6).
February 3, 1972	Certified original record & proceedings for: Cahill, Gordon, et al. (& in 71-1274-5-6).
February 15, 1972	Filed receipt by Supreme Court of original record (& in 71-1274-5-6).
February 22, 1972	Filed notice of filing of petition for writ of certiorari (& in 71-1274-5-6) (71-1059).
April 24, 1972	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 71-1274-5-6).

Amended and Supplemental Complaint

(Document No. 206)

UNITED STATES DISTRICT COURT

Southern District of New York

67 Civ. 4042

Kern County Land Company, a Delaware corporation,

Plaintiff,

against

Occidental Petroleum Corporation, a California corporation,

Defendant.

Plaintiff, for its amended and supplemental complaint, alleges as follows:

1. Plaintiff is a Delaware corporation having its principal place of business at San Francisco, California. Prior to September 1967, plaintiff was known as KCL Corporation. Plaintiff is a wholly-owned subsidiary of Tenneco Corporation, a Delaware corporation. Tenneco Corporation is a subsidiary of Tenneco Inc., a Delaware corporation.

2. Plaintiff is the assignee of all claims and choses in action of Kern County Land Company (hereinafter "old Kern"), a dissolved California corporation which, from August 30, 1967 until it was dissolved on October 6, 1967, was known as 600 California Corporation, including any

and all claims and choses in action for profits inuring to and recoverable by old Kern pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b).

3. Defendant is a California corporation having its principal place of business at Los Angeles, California. Defendant transacts business in the Southern District of New York.

4. This Court has jurisdiction of this action pursuant to the provisions of Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa. Certain of the acts and transactions alleged herein occurred in the Southern District of New York.

5. At all times referred to herein, up to and including October 13, 1967, the Capital Stock of old Kern, a class of non-exempted equity security, was registered on the New York and Pacific Coast Stock Exchanges pursuant to Section 12 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78L.

6. On information and belief, on or about May 8, 1967 defendant made a public tender offer on a first-come first-served basis to purchase for cash up to 500,000 shares of said Capital Stock of old Kern at a price of $83.50 per share to the seller, plus $1.50 commission to brokers. On May 15, 1967 defendant published an announcement that the number of shares subject to such purchase offer had been increased to 1,000,000.

7. On information and belief, as a result of the aforesaid tender offer, between May 8, 1967 and June 8, 1967, the exact date or dates being unknown to plaintiff, defendant purchased and became the beneficial owner of in excess of 887,000 shares of Capital Stock of old Kern, an amount

equivalent to 20.5 per centum of old Kern's outstanding Capital Stock. Occidental expended approximately $75,400,000 in connection with the aforesaid acquisition of old Kern's Capital Stock.

8. On or about May 19, 1967 management of old Kern announced that its Board of Directors had voted to accept an offer of Tenneco Inc. to exchange the business and assets of old Kern, subject to its liabilities, for shares of a new $5.50 Cumulative Convertible Preference Stock of Tenneco Inc. on the basis of one share of said Tenneco Preference Stock for each share of old Kern's Capital Stock, subject to stockholder approval.

9. Thereafter, a written Agreement and Plan of Reorganization, dated as of June 1, 1967, was entered into between plaintiff, Tenneco Inc. and old Kern. The stockholders of Tenneco Inc. authorized the creation of the aforesaid new class of Tenneco Preference Stock on July 11, 1967, and the stockholders of old Kern approved the aforesaid Agreement and Plan of Reorganization on July 17, 1967.

10. On or about June 2, 1967 defendant granted Tenneco Corporation, a subsidiary of Tenneco Inc., an option to purchase from defendant 886,623 shares of the aforesaid Tenneco Preference Stock to be issued to old Kern's stockholders upon consummation of the aforesaid Agreement and Plan of Reorganization, for a total price of $93,095,415 ($105 per share), said option not to be exercisable until after December 9, 1967. Tenneco Corporation paid defendant $8,866,230 for said option, said amount to be credited against the total purchase price upon exercise of the option.

11. On August 30, 1967 the closing, pursuant to the aforesaid June 1, 1967 Agreement, was held. On said date, certificates representing the shares of the aforesaid Tenneco Preference Stock received by old Kern were deposited by it with the Wells Fargo Bank, San Francisco, as Exchange Agent, with irrevocable instructions for distribution of such shares to old Kern shareholders on a one-for-one basis upon receipt of their old Kern stock certificates for cancellation and retirement.

12. On December 11, 1967, in Nassau, Bahamas, Occidental exchanged certificates representing 886,623 shares of old Kern's Capital Stock for a certificate representing a like number of shares of the aforesaid Tenneco Preference Stock (not having availed itself previously of its right to receive said Preference Stock) and thereupon transferred said certificate to the LR Investment Trust (the assignee of Loeb, Rhoades & Co. which had on August 16, 1967 purchased from Tenneco Corporation the option contained in the aforesaid June 2, 1967 option agreement between Tenneco Corporation and Occidental) against credits to Occidental's accounts at various banks in the amount of $84,229.185. Said amount constituted the option price of $93,095.415 less the amount of $8,866,230 previously paid to Occidental.

COUNT I

For a first claim for relief plaintiff alleges:

13. Each and every allegation set forth in paragraphs "1" through "12" inclusive is repeated and realleged as though fully set forth herein.

14. On information and belief, defendant's acquisition of in excess of 887,000 shares of Capital Stock of old Kern as set forth in paragraph "7" hereof constituted a pur-

chase of said securities at a time when defendant was the beneficial owner of more than 10 per centum of said securities. Said securities were not acquired in connection with a debt previously contracted.

15. On information and belief, defendant's sale to Tenneco Corporation of an option to purchase from defendant 886,623 shares of said Tenneco Preference Stock to be issued to old Kern's stockholders as set forth in paragraph "10" hereof constituted a sale of the Capital Stock of old Kern at a time when defendant was the beneficial owner of more than 10 per centum of said stock.

16. On information and belief, the aforesaid purchase and sale occurred within a period of less than six months.

17. On information and belief, by reason of the aforesaid purchase and sale, defendant realized profits, which profits are recoverable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p.

COUNT II

For a second claim for relief plaintiff alleges:

18. Each and every allegation set forth in paragraphs "1" through "12" inclusive is repeated and realleged as though fully set forth herein.

19. On information and belief, on or before May 10, 1967, the exact date being unknown to plaintiff, defendant by a purchase of shares of Capital Stock of old Kern became the beneficial owner of more than 10 per centum of the shares of Capital Stock of old Kern. Defendant thereafter purchased additional shares of Capital Stock of old Kern and by June 6, 1967 became the beneficial owner of in excess of 887,000 shares of Capital Stock of old Kern as

set forth in paragraph "7" hereof. Said purchase of shares of Capital Stock of old Kern by which defendant became the beneficial owner of more than 10 per centum of the shares of Capital Stock of old Kern and said purchases by defendant of additional shares of Capital Stock of old Kern constituted purchases of said securities at a time when defendant was the beneficial owner of more than 10 per centum of said securities. Said securities were not acquired in connection with a debt previously contracted.

20. On information and belief, defendant's sale to Tenneco Corporation of an option to purchase from defendant 886,623 shares of said Tenneco Preference Stock to be issued to old Kern's shareholders as set forth in paragraph "10" hereof constituted a sale of said Capital Stock of old Kern at a time when defendant was the beneficial owner of more than 10 per centum of said stock.

21. On information and belief, the aforesaid purchasers and sale occurred within a period of less than six months.

22. On information and belief, by reason of the aforesaid purchases and sale, defendant realized profits, which profits are recoverable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p.

COUNT III

For a third claim for relief plaintiff alleges:

23. Each and every allegation set forth in paragraphs "1" through "12" inclusive is repeated and realleged as though fully set forth herein.

24. On information and belief, defendant's acquisition of in excess of 887,000 shares of Capital Stock of old Kern as set forth in paragraph "7" hereof constituted a pur-

chase of said securities at a time when defendant was the beneficial owner of more than 10 per centum of said securities. Said securities were not acquired in connection with a debt previously contracted.

25. On information and belief, the receipt by old Kern of shares of Tenneco Preference Stock and the deposit thereof with the Exchange Agent on August 30, 1967 under the terms and conditions alleged in paragraph "11" hereof, constituted a sale by defendant of all of its shares of Capital Stock of old Kern at a time when defendant was the beneficial owner of more than 10 per centum of the Capital Stock of old Kern.

26. On information and belief, the aforesaid purchase and sale occurred within a period of less than six months.

27. On information and belief, by reason of the aforesaid purchase and sale, defendant realized profits, which profits are recoverable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p.

COUNT IV

For a fourth claim for relief plaintiff alleges:

28. Each and every allegation set forth in paragraphs "1" through "12" inclusive is repeated and realleged as though fully set forth herein.

29. On information and belief, on or before May 10, 1967, the exact date being unknown to plaintiff, defendant by a purchase of shares of Capital Stock of old Kern became the beneficial owner of more than 10 per centum of the shares of Capital Stock of old Kern. Defendant thereafter purchased additional shares of Capital Stock of old

Kern and by June 6, 1967 became the beneficial owner of in excess of 887,000 shares of Capital Stock of old Kern as set forth in paragraph "7" hereof. Said purchase of shares of Capital Stock of old Kern by which defendant became the beneficial owner of more than 10 per centum of the shares of Capital Stock of old Kern and said purchases by defendant of additional shares of Capital Stock of old Kern constituted purchases of said securities at a time when defendant was the beneficial owner of more than 10 per centum of said securities. Said securities were not acquired in connection with a debt previously contracted.

30. On information and belief, the receipt by old Kern of shares of Tenneco Preference Stock and the deposit thereof with the Exchange Agent on August 30, 1967 under the terms and conditions alleged in paragraph "11" hereof, constituted a sale by defendant of all of its shares of Capital Stock of old Kern at a time when defendant was the beneficial owner of more than 10 per centum of the Capital Stock of old Kern.

31. On information and belief, the aforesaid purchases and sale occurred within a period of less than six months.

32. On information and belief, by reason of the aforesaid purchases and sale, defendant realized profits, which profits are recoverable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment:

(a) Requiring defendant to account for all profits realized by it from the transaction set forth in the First, Second, Third and Fourth Counts hereof, together with interest thereon.

(b) Granting plaintiff such other and further relief as the Court may deem just and proper.

Dated: New York, New York
February 28, 1968

CAHILL, GORDON, SONNETT, REINDEL & OHL

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Defendant's Amended Answer and Counterclaim

(Document No. 223)

UNITED STATES DISTRICT COURT

Southern District of New York

67 Civ. 4042

Kern County Land Company, a Delaware Corporation,

Plaintiff,

and

Stephen Abrams,

Plaintiff-Intervenor,

Occidental Petroleum Corporation, a California corporation,

Defendant,

Tenneco, Inc., a Delaware corporation; 600 California Corporation, a dissolved California corporation; Dwight M. Cochran and George C. Montgomery, individually and as officers and Directors of 600 California Corporation,

Defendants to Counterclaim.

Defendant, by its attorneys, Phillips, Nizer, Benjamin, Krim & Ballon, for its amended answer and counterclaim to the amended and supplemental complaint herein, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 1

and 4 of the amended and supplemental complaint, except admits that plaintiff purports to base jurisdiction of this action upon Section 27 of the Securities Exchange Act of 1934 and that certain of the acts and transactions alleged in the amended and supplemental complaint occurred within the Southern District of New York.

2. Denies each and every allegation of paragraph 2 of the amended and supplemental complaint, except admits that plaintiff purports to be the assignee of all claims and choses in action of Kern County Land Company, now known as 600 California Corporation, (a dissolved California corporation), hereinafter sometimes referred to as "Old Kern", including any and all claims and choses in action for profits inuring to and recoverable by Old Kern pursuant to Section 16(b) of the Securities Exchange Act of 1934.

3. Denies each and every allegation of paragraph 3 of the amended and supplemental complaint, except admits that defendant is a corporation organized under the laws of, and has its principal place of business in, the State of California.

4. Denies each and every allegation of paragraph 5 of the amended and supplemental complaint, except admits that the capital stock of Old Kern was registered on the New York and Pacific Coast Stock Exchanges pursuant to law.

5. Denies each and every allegation of paragraph 6 of the amended and supplemental complaint, except admits that on May 8, 1967, defendant released for publication its tender offer to acquire 500,000 shares of Old Kern at the price of $83.50 per share, and that on May 11, 1967 defendant extended its public offer to cover an additional

500,000 shares of Old Kern at the same price, reference to which is respectfully made by defendant for the full terms and contents thereof.

6. Denies each and every allegation of paragraph 7 of the amended and supplemental complaint, except admits that during May and June 1967 defendant acquired by a series of separate purchases approximately 885,000 shares of Old Kern at an approximate cost of $74,000,000, pursuant to its tender offer to Old Kern stockholders.

7. Admits the allegations of paragraphs 8 and 9 of the amended and supplemental complaint, and further states that defendant abstained from voting at the meeting of stockholders of Old Kern at which the Agreement and Plan of Reorganization (hereinafter the "Plan") was submitted for approval, which was tantamount to opposing same under California law. Reference is respectfully made to said Plan for the full terms and contents thereof.

8. Denies each and every allegation of paragraph 10 of the amended and supplemental complaint, except admits that on or about June 2, 1967 defendant and Tenneco Corporation, a subsidiary of Tenneco, Inc., entered into an option agreement and reference is respectfully made to said option agreement for the full contents thereof.

9. Denies each and every allegation of paragraph 11 of the amended and supplemental complaint, except admits that the plaintiff, Old Kern and Tenneco, Inc., purported to close on August 30, 1967 the aforesaid Agreement and Plan of Reorganization in violation, and with knowledge, of the outstanding restraining order issued by the District Court of Knox County, Texas, for the 50th Judicial District prohibiting such closing.

10. Denies each and every allegation of paragraph 12 of the amended and supplemental complaint, except admits that on December 11, 1967, in Nassau, Bahamas, Occidental exchanged certificates representing 886,623 shares of Old Kern's capital stock for a certificate representing a like number of shares of Tenneco Preference Stock and thereupon transferred said certificate to the L.R. Fixed Investment Trust, against payment of the sum of $84,229,185, said amount constituting the option price of $93,095,415, less the amount of $8,866,230 previously paid to Occidental. Defendant further states that by reason of the election of Tenneco Corporation's assignee to exercise the aforesaid option, defendant had no alternative but to comply therewith in view of the outstanding restraining order issued by Judge Brewster of the United States District Court for the Northern District of Texas in the action entitled *"600 California Corp.* v. *Harjean Co."*, No. 23,170, prohibiting defendant from contesting the validity of the aforesaid closing in any pending or future proceeding.

As to Count I

11. Answering paragraph 13 of the amended and supplemental complaint, defendant repeats and realleges paragraphs 1 through 10, inclusive, above.

12. Denies each and every allegation of paragraphs 14, 15, 16 and 17 of the amended and supplemental complaint.

As to Count II

13. Answering paragraph 18 of the amended and supplemental complaint, defendant repeats and realleges paragraphs 1 through 10, inclusive, above.

14. Denies each and every allegation of paragraphs 19, 20, 21 and 22 of the amended and supplemental complaint.

Defendant's Amended Answer and Counterclaim

As to Count III

15. Answering paragraph 23 of the amended and supplemental complaint, defendant repeats and realleges paragraphs 1 through 10, inclusive, above.

16. Denies each and every allegation of paragraphs 24, 25, 26 and 27 of the amended and supplemental complaint.

As to Count IV

17. Answering paragraph 28 of the amended and supplemental complaint, defendant repeats and realleges paragraphs 1 through 10, inclusive, above.

18. Denies each and every allegation of paragraphs 29, 30, 31 and 32 of the amended and supplemental complaint.

As and for a First Separate and Affirmative Defense

19. The amended and supplemental complaint fails to set forth any claim upon which relief can be granted against defendant.

As and for a Second Separate Affirmative Defense to Counts III and IV

20. On August 21, 1967, the District Court of Knox County, Texas, for the 50th Judicial District, in an action entitled "*Harjean Company* v. *Kern County Land Company, et al.*," No. 5961, in which Tenneco Inc. and KCL Corporation (the plaintiff) were also defendants, entered an order restraining said "defendants, in person or by their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, consummating or concluding any such sale, transfer or exchange of the business or assets of [Old Kern]" to KCL Corporation in ex-

change for shares of $5.50 Cumulative Convertible Preference Stock without par value ($100 liquidation value) of Tenneco, Inc. as provided in the Plan pending the hearing of plaintiff's motion for a temporary injunction.

21. On August 28, 1967, the above District Court of Knox County, Texas, entered an order continuing in full force and effect the restraining order referred to in paragraph 20, above, to September 2, 1967.

22. On August 30, 1967, plaintiff, Old Kern and Tenneco, Inc., with full knowledge of the aforesaid restraining order, did wilfully, deliberately and in violation of said restraining order, close and consummate the transfer of all the assets of Old Kern to KCL Corporation in exchange for new Tenneco, Inc. $5.50 Cumulative Convertible Preference Stock without par value ($100 liquidation value) pursuant to the terms of the Plan.

23. To the extent, therefore, that the amended and supplemental complaint purports to state a claim for relief under the third and fourth counts by plaintiff, as assignee of Old Kern, against defendant by reason of the aforesaid closing and transfer of assets against new shares of Tennaco, Inc., such claim is barred because of the wilful, deliberate and contemptuous acts of plaintiff, its assignor Old Kern, and others, in violating the aforesaid restraining order, and because of the well settled doctrine which precludes any person from predicating a claim upon his own wrong.

AS AND FOR A THIRD SEPARATE AFFIRMATIVE DEFENSE TO COUNTS III AND IV

24. On September 2, 1967, the District Court of Knox County, Texas, for the 50th Judicial District, in an action

entitled "*Harjean Company* v. *Kern County Land Company et al.*", No. 5961, in which Tenneco, Inc. and plaintiff were also defendants, signed an order directing said defendants and others to show cause "why they should not be punished as for contempt for their acts and conduct in closing and consummating the transfer of the assets of [Old Kern] to KCL Corporation [plaintiff] on August 30, 1967, in violation of the temporary restraining order entered by the District Court of Knox County, Texas, on August 21, 1967".

25. In the event plaintiff and said defendants Old Kern, Tenneco, Inc., and others, are found guilty of contempt as charged, the District Court of Knox County, Texas, for the 50th Judicial District, has the power to direct plaintiff and said defendants to purge themselves of said contempt by undoing the act they did in violation of the Court's restraining order.

26. By reason of the foregoing, plaintiff's claim for relief under the third and fourth counts is premature and will continue to be premature until such time as the aforesaid order to show cause is finally disposed of and concluded.

AS AND FOR A FOURTH SEPARATE AFFIRMATIVE DEFENSE TO COUNTS III AND IV AND A FIRST COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM HEREIN

27. At all times herein mentioned, defendant to counterclaim Tenneco, Inc. (hereinafter called "Tenneco"), was and now is a corporation existing under and by virtue of the laws of the State of Delaware.

28. Since June 8, 1967, plaintiff (hereinafter sometimes referred to as "New Kern"), was and now is a corpora-

tion existing under and by virtue of the laws of the State of Delaware, and was and now is a wholly-owned subsidiary of Tenneco, Inc.

29. Although it dissolved in or about September, 1967, at all times prior thereto defendant to counterclaim 600 California Corporation (formerly known as Kern County Land Company and sometimes referred to herein as "Old Kern") was a corporation existing under and by virtue of the laws of the State of California.

30. At all times herein mentioned defendants to counterclaim Dwight M. Cochran and George C. Montgomery, were officers and directors of Old Kern.

31. In consideration of defendant Occidental's agreement to dismiss the stockholder's suits which it had commenced against plaintiff's assignor, Old Kern, in the Superior Court of California for the City and County of San Francisco and of Occidental's agreement to grant Tenneco Corporation an option to purchase the new preference stock of Tenneco, Inc., which Occidental would receive as a result of the closing of the Plan, it was agreed by and between Occidental, Tenneco, Old Kern and plaintiff, that such closing would not occur prior to December 9, 1967, in the absence of a favorable ruling from the Securities and Exchange Commission exempting Occidental from liability under Section 16(b) of the Securities Exchange Act of 1934 by reason of its acquisition of Old Kern's stock by public offering within six months prior to the closing of the aforesaid transaction.

32. In violation of said agreement and understanding, plaintiff, its assignor Old Kern and Tenneco, Inc., without the knowledge or consent of Occidental, and with full knowledge of Occidental's rights under said agreement,

closed the aforesaid transaction on August 30, 1967, notwithstanding the absence of the favorable ruling from the Securities and Exchange Commission.

33. The aforesaid closing was accomplished with the active participation and cooperation of defendants to counterclaim Cochran and Montgomery, each of whom well knew the rights of Occidental, and the potential risks to Occidental of a closing occurring prior to December 9, 1967.

34. By reason of the foregoing, plaintiff, as a principal actor and as assignee of Old Kern, is not only estopped from making any claim for relief against Occidental under the third and fourth counts, but Occidental is entitled to recover from said plaintiff, New Kern, and defendants to counterclaim Tenneco, Old Kern, Cochran and Montgomery all the damages and expenses it has sustained or will sustain as a result of said breach of contract, which damages and expenses will exceed the amount of plaintiff's claims herein.

AS AND FOR A FIFTH, SEPARATE AFFIRMATIVE DEFENSE TO COUNTS III AND IV AND A SECOND COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM HEREIN

35. Prior to June 1, 1967, Occidental had commenced two stockholder actions in the Superior Court of the State af California against Old Kern, to obtain certain information regarding the assets and affairs of Old Kern. While said actions were pending and prior to July 17, 1967, Old Kern and Tenneco submitted a proxy statement to Occidental and other shareholders of Old Kern which represented that the Plan would be consummated on a date to be agreed upon during the period from September 30 to December 31, 1967, and that the option granted by Occidental

to a subsidiary of Tenneco to acquire the 886,623 shares of Tenneco which Occidental would receive under the Plan would not be exercisable until after December 9, 1967. Moreover, the Proxy Statement failed to list as an asset of Old Kern or New Kern the alleged claim against Occidental arising under Section 16(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78p(b). All of the foregoing constituted a representation to Occidental and the other shareholders of Old Kern that the Plan would not be consummated until after December 9, 1967. Relying on said representations, Occidental dismissed its two said stockholder actions. But for the aforesaid representations, Occidental would not have dismissed said stockholders' actions and said Plan would not have closed prior to December 9, 1967.

36. By reason of the foregoing, plaintiff is estopped from making any claim for relief against Occidental, as assignee of Old Kern, under the third and fourth counts and Occidental is entitled to recover from plaintiff and from defendants to counterclaim Tenneco, Old Kern, Cochran and Montgomery all the damages and expenses it has sustained or will sustain as a result of said misrepresentation by Old Kern and said defendants to counterclaim, which damages and expenses will exceed the amount of plaintiff's claim herein.

AS AND FOR A SECOND SEPARATE AFFIRMATIVE DEFENSE TO COUNTS I AND II

37. To the extent that the amended and supplemental complaint purports to state a claim for relief under Counts I and II because of the option agreement, dated June 2, 1967, entered into between Occidental and Tenneco Corporation, said claim is barred by reason of the fact that Old Kern and its stockholders had approved the Plan with full knowledge of said option agreement, Occidental not voting at such meeting of Old Kern's stockholders.

Defendant's Amended Answer and Counterclaim

AS AND FOR A THIRD COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM HEREIN

38. Paragraphs 20 through 22, 24, 25 and 27 through 33, inclusive, of this amended answer and counterclaim are, by this reference, incorporated herein as though said paragraphs were fully set forth.

39. By reason of the wilful, deliberate and contemptuous acts of plaintiff, its assignor, Old Kern, and defendants to counterclaim, Tenneco, Inc., Cochran and Montgomery, Occidental has been subjected to numerous claims and actions totaling more than $20,000,000, including interest, allegedly brought pursuant to Section 16(b) of the Securities Exchange Act of 1934, and has been required to incur substantial expenses and attorneys fees to defend said claims and actions, for which recovery is sought against plaintiff and defendants to counterclaim Tenneco, Inc., Old Kern, Cochran and Montgomery.

AS AND FOR A FOURTH COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM HEREIN

40. Paragraphs 27 through 30, inclusive, of this amended answer and counterclaim are, by this reference, incorporated herein as though said paragraphs were fully set forth.

41. This counterclaim arises under Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b) and 78n(a); and Rules 10b-5 and 14a-9 promulgated pursuant to the Securities Exchange Act of 1934, 17 C.F.R. 240.10b-5 and 240.14a-9, and Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77q(a). Some of the acts and transactions complained of by this counterclaim, and which constituted violations of the aforesaid provisions, occurred within the Southern District of

New York. The Court has jurisdiction of the subject matter by virtue of Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78aa, and Section 22 of the Securities Act of 1933, as amended, 15 U.S.C. § 77v.

42. Defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, by use of means and instrumentalities of interstate commerce and of the mails, engaged in a course of conduct which acted as a fraud upon Occidental and the other shareholders of Old Kern, in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b); and Rule 10b-5 promulgated pursuant to the Securities Exchange Act of 1934, 17 C.F.R. 240.10b-5, and Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77q (a). Said course of conduct included, among others, the following acts:

(a) After Occidental, on or about May 8, 1968, announced its tender offer for Old Kern stock, Old Kern, Cochran and Montgomery, on or about May 12, 1967, requested Tenneco, Inc., to submit an offer for the acquisition of Old Kern's assets, which offer would provide for the continuation of Old Kern's officers and directors, including Cochran and Montgomery, as officers of the plaintiff. To enable it to make an offer, Tenneco, Inc., was invited to examine, and did examine, the confidential books, records and reports of Old Kern, including various estimates and appraisals possessed by Old Kern of the actual value of its assets. By contrast, Occidental, which had expressed a desire to make an offer for Old Kern's assets, was not allowed the same opportunity to inspect said confidential books and records. Had Occidental and other potential purchasers been permitted to examine said books, records and reports of Old Kern, a competitive bid substantially higher than Tenneco's bid would have been received for Old Kern's assets.

(b) On or about May 18, 1967, Tenneco, Inc., submitted to Old Kern an offer, the substance of which provided that substantially all the assets of Old Kern would be transferred to plaintiff, in exchange for the transfer by plaintiff to Old Kern of $5.50 Convertible Preferred Tenneco Stock. Said Tenneco stock would thereafter be distributed by Old Kern to its shareholders on the basis of one share of Tenneco stock for each share of Old Kern stock. Before accepting said offer, Old Kern, Cochran and Montgomery, and each of them, demanded and received from Tenneco a written promise that some of Old Kern's officers and directors, including Cochran and Montgomery, would retain their positions in plaintiff. Thereafter, on or about May 19, 1967, the Board of Directors of Old Kern met, discussed and accepted the offer submitted by Tenneco, Inc. Said offer was unfairly advantageous to Tenneco, Inc., and disadvantageous to the shareholders of Old Kern, including Occidental. Because of the nature and extent and actual value of Old Kern's assets, the negotiations and discussions conducted by defendants Old Kern, Cochran and Montgomery, and each of them, were totally inadequate to arrive at a fair and competitive offer for Old Kern's assets. Old Kern, Cochran and Montgomery, and each of them, also failed to devote sufficient time and effort to exploring other possible purchasers interested in bidding for Old Kern's assets, or other alternatives to accepting Tenneco's offer.

(c) After Tenneco's offer was accepted by Old Kern's directors, as heretofore averred in sub-paragraph (b), a Plan and Agreement of Reorganization (hereinafter referred to as the "Plan") was drafted incorporating the terms of said offer and was subsequently executed by Old Kern and Tenneco, Inc. as of June 1, 1967. Old Kern was required by law to obtain approval of the Plan by its shareholders. Realizing that if all material facts were disclosed

to said shareholders, such approval would not be obtained, defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, in furtherance of their course of conduct designed to defraud Occidental and the other shareholders of Old Kern, and by use of means and instrumentalities of interstate commerce and of the mails, made material misrepresentations to Occidental and the other shareholders of Old Kern and, in addition, failed to disclose to Occidental and the other shareholders of Old Kern material facts required to be disclosed in order to make the statements made to Occidental and the other shareholders of Old Kern not misleading in light of the circumstances under which they were made (which, by themselves constitute violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b) and 78n(a); and of Rules 10b-5 and 14a-9 promulgated under the Securities Exchange Act of 1934), including, but not limited to, the following:

(c)(i) Making a representation to Occidental and the other shareholders of Old Kern that the value of Old Kern's assets was approximately $100 per share of outstanding Old Kern stock whereas, in fact, the actual value of said assets was, and was known by defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, to be at least $125 per share.

(c)(ii) Sending a letter to Occidental and the other shareholders of Old Kern which stated that "the Agreement and Plan of Reorganization . . . was entered into after comprehensive discussion with the management of Tenneco and after . . . [Old Kern's] Board of Directors had carefully considered the proposed combination," whereas, in fact, the substance of said Plan was discussed with Tenneco's management for only a few hours on or about May 12, 1967, and was considered by Old Kern's Board of Directors for only a few hours on May 19, 1967,

before acceptance. Because of the vast size and uniqueness of Old Kern's assets, such discussions and consideration were anything but "comprehensive" and "careful." In addition, prior to accepting Tenneco's offer, Old Kern, Cochran and Montgomery sent letters to Occidental and the other shareholders of Old Kern, referring to "a number of offers" received from strong and reputable firms. These letters were designed to, and did, convey the impression to Occidental and the other Old Kern shareholders that Old Kern was actively negotiating with numerous large concerns, and that Tenneco's offer was being accepted in an arms length transaction after competitive bidding. In fact, however, other than Occidental, only Tenneco made an offer for Old Kern's assets. This fact was never disclosed to Occidental and the other shareholders of Old Kern, who were thereby misled into believing that a fair and reasonable price had been obtained for the assets of Old Kern only after extensive competitive bidding, comprehensive negotiations and careful consideration had been conducted.

(c)(iii) Sending a Proxy Statement to Occidental and the other shareholders of Old Kern which totally failed to convey information required to be included in order that Occidental and the other shareholders of Old Kern could make an informed judgment as to the fairness of Tenneco's offer in relation to the value of the assets to be transferred to New Kern. Nothing was contained in said Proxy Statement which would indicate the fairness of said offer or the value of the consideration to be transferred by Old Kern to plaintiff. Because of the unique nature of Old Kern's assets, comprising mainly large land and oil holdings as well as partial ownership of other companies, the Proxy Statement was required, but failed, to disclose the value of said assets or at least the methods used by the officers and directors of Old Kern to arrive at a valuation of Old

Kern's assets in relation to Tenneco's offer. Furthermore, said Proxy Statement failed to disclose that Old Kern possessed valuations of its assets which were considered material and had been used by both Tenneco and Old Kern in negotiating and accepting Tenneco's offer, notwithstanding that such was in fact true. Said valuations showed that the consideration to be transferred from Old Kern to plaintiff exceeded the consideration to be received by Old Kern by at least $25 per share of Old Kern stock, but such was not disclosed in said Proxy Statement or otherwise. The only value which was disclosed in said Proxy Statement for Old Kern's some two million acres of land was its cost basis, which was entirely misleading, since the value of said land had appreciated to an extent that cost figures were completely meaningless. The Proxy Statement also failed to disclose the value of Old Kern's oil reserves and other oil properties, although such value was known by defendants to counterclaim Old Kern, Cochran and Montgomery, and to each of them. Moreover, the Proxy Statement failed to set forth on an unconsolidated basis the financial condition and the value of Watkins-Johnson Company in which Old Kern had approximately a fifty-seven percent (57%) interest, even though the value of said interest was known by defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, to equal approximately seventy million dollars ($70 million), which value greatly exceeded the value assigned to Old Kern's interest in Watkins-Johnson Company in the consolidated financial statements contained in said Proxy Statement. The misstatements contained in the said Proxy Statement, and the failure to disclose material facts required to be disclosed in order to make the statements made not misleading in the light of the circumstances under which they were made, constituted violations of Section 14(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C.

§ 78n(a), and Rule 14a-9, promulgated thereunder, 17 C.F.R. 240.14a-9.

(c)(iv) Had Occidental and the other shareholders of Old Kern been informed of each or any of the foregoing facts averred in each of sub-paragraphs (c)(i) through (iii), each of which facts was known to defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, Occidental and the other Old Kern shareholders would have realized that the Plan was unfairly advantageous to Tenneco, Inc., at the expense of Old Kern, and would have refused to approve said Plan. Said defendants to counterclaim, Old Kern, Cochran and Montgomery, and each of them, knew that Occidental and the other shareholders of Old Kern did not know of each of said facts.

(d) To further insure the success of their fraudulent course of conduct, defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, set up the transaction as a sale of assets rather than as a merger, even though Old Kern and its directors considered the transaction to be a merger. By using said legal form, which required approval by only a majority of the shareholders instead of by two-thirds as would have been required for a merger, said defendants to counterclaim Old Kern, Cochran and Montgomery, were able to thwart effective opposition to the Plan from Occidental and other shareholders of Old Kern.

(e) The directors of Old Kern, including Cochran and Montgomery, realizing that the above-averred course of conduct operated as a fraud upon Occidental and the other shareholders of Old Kern, demanded and received from Tenneco an agreement indemnifying them from liability for their acts. Having thus been relieved of the consequences of their acts, the directors of Old Kern agreed to close the transaction. But for said agreement

of indemnification, said directors would not have closed the Plan. The proxy statement and other communications addressed by defendants to counterclaim Old Kern, Cochran and Montgomery to Occidental and other Old Kern shareholders failed to disclose the existence of the aforesaid indemnity agreement.

43. As a direct result of the above-averred fraudulent course of conduct, including each, severally, of the material omissions and misrepresentations made to Occidental and the other shareholders of Old Kern, the Old Kern shareholders, on or about July 17, 1967, approved the Plan described in paragraph 42(c), above. But for said fraududent acts and conduct of defendants to counterclaim Old Kern, Cochran and Montgomery, the Plan would not have been approved by the shareholders of Old Kern, the assets of Old Kern would not have been transferred to plaintiff for in excess of $25 per share less than their fair value, and Occidental would not have been required to exchange its Old Kern stock for Tenneco stock and Occidental would not have been subjected to claims and other damages under Section 16(b) of the Securities Exchange Act of 1934.

44. The fair value of Old Kern's assets did exceed, and was known by defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, to exceed, Tenneco's offer by at least $25 per share of Old Kern stock. Because the stock of plaintiff is wholly owned by Tenneco, Inc., in which the stockholders of Old Kern have only a minority interest, the former shareholders of Old Kern have not retained their equity in Old Kern's assets. The total damage to Occidental as a result of the wilful and deliberate violations of Sections 10(b) and 14(a) of the Securities Act of 1934, as amended, 15 U.S.C. §§ 78j(b) and 78n(a), and of Rules 10b-5 and 14a-9 promulgated thereunder, 17 C.F.R. 240.106-5 and 240.14a-9, by defend-

ants to counterclaim Old Kern, Cochran and Montgomery, and each of them, as hereinabove set forth, is in excess of $20 million.

45. Plaintiff and defendant to counterclaim, Tenneco, Inc., knowingly aided and abetted, acted in concert with, and agreed with defendants to counterclaim Old Kern, Cochran and Montgomery in the above-avered course of conduct, including the making of said material omissions and misrepresentations to Occidental and the other shareholders of Old Kern. In addition, defendant to counterclaim Tenneco, Inc. and plaintiff encouraged, participated in, and received the benefits of the Plan which they knew was fraudulent and unfair to Occidental and the other shareholders of Old Kern, as hereinabove set forth. Finally, plaintiff agreed to assume the liabilities of Old Kern, and defendant to counterclaim Tenneco, Inc., agreed to indemnify defendants to counterclaim Old Kern, Cochran and Montgomery for all liabilities resulting from the above-averred course of business. Whether because of their independent wrongs, as aforesaid, or by reason of the agreement of indemnity and/or the receipt of Old Kern's assets for an inadequate consideration, plaintiff and defendant to counterclaim Tenneco, Inc., are responsible for damages sustained by Occidental in an amount in excess of $20 million.

46. By reason of the foregoing, plaintiff and defendants to counterclaim should be held liable to Occidental for exemplary or punitive damages, together with interest at the rate of 7% per annum from the date when said damages may be determined to have been sustained.

AS AND FOR A FIFTH COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM HEREIN

47. Paragraphs 27 through 30, 42, 44 and 45 of this amended answer and counterclaim are, by this reference,

incorporated herein as though said paragraphs were fully set forth.

48. The acts of defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, which are set forth in paragraph 42 of this answer and counterclaim, not only violated federal law, but also violated sections 1572, 1709 and 1710 of the California Civil Code and section 820 of the California Corporations Code.

49. In addition, defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, violated said California Law by knowingly obtaining a price for Old Kern's assets which was substantially less than the fair market value of said assets.

50. The above-averred fradulent and deceitful acts by defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, resulted in Occidental's exchanging its Old Kern stock for Tenneco stock, which exchange directly caused Occidental to be deprived of the value of its Old Kern stock by the sum of at least $20 million and to be subjected to claims and other damages under Section 16(b) of the Securities Exchange Act of 1934.

51. Plaintiff and defendant to counterclaim, Tenneco, Inc., acted in concert with, and agreed with defendants to counterclaim Old Kern, Cochran and Montgomery in the above-averred fraudulent and deceitful acts. In addition, Tenneco, Inc., and plaintiff encouraged, participated in, and received the benefits of the Plan which they knew was approved because of said fraudulent and deceitful acts and was unfair to Occidental and the other shareholders of Old Kern as hereinabove set forth. Finally, plaintiff agreed to assume the liabilities of Old Kern, and defendant to counterclaim Tenneco, Inc., agreed to indemnify defendants

to counterclaim Old Kern, Cochran and Montgomery for all liabilities resulting from the above-averred course of conduct. Whether because of their independent wrongs, as aforesaid, or by reason of the agreement of indemnity and/or the receipt of Old Kern's assets for an inadequate consideration, plaintiff and defendant to counterclaim Tenneco, Inc., are responsible for damages sustained by Occidental in an amount in excess of $20 million.

AS AND FOR A SIXTH COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM

52. Paragraphs 27 through 30, 42, 44 and 45 of this amended answer and counterclaim are, by this reference, incorporated herein as though said paragraphs were fully set forth.

53. Before accepting Tenneco's offer to purchase Old Kern's assets and recommending Old Kern shareholder approval of the Plan, defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, owed fiduciary duties to Occidental and the other shareholders of Old Kern to ascertain the true value of, and then to obtain an adequate price for, the assets which Old Kern was transferring to plaintiff.

54. Through negligence, or otherwise, defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, breached said duties by failing:

(a) To ascertain the value of Old Kern's assets prior to accepting Tenneco's offer;

(b) To obtain reliable estimates and/or appraisals of Old Kern's assets, or, in the alternative, to carefully consider and analyze those estimates and appraisals of the value of its assets which Old Kern did possess;

(c) To allow sufficient time and opportunity for competitive bidding for the assets of Old Kern;

(d) To give others, including Occidental, the same access to Old Kern's corporate books, records, reports, asset appraisals, etc., as was given to Tenneco, Inc.;

(e) To bargain and negotiate at arm's length with Tenneco, Inc., in order that an offer more favorable to Occidental and the other shareholders of Old Kern, and more in keeping with the actual value of its assets, could have been obtained; and

(f) To consider carefully Tenneco's offer and the alternatives which existed in lieu of accepting Tenneco's offer.

55. The above-averred breaches of fiduciary duties owing by defendants to counterclaim Old Kern, Cochran and Montgomery to Occidental and the other shareholders of Old Kern, resulted in Occidental's exchanging its Old Kern stock for Tenneco stock, which exchange directly caused Occidental to be deprived of the value of its Old Kern stock by the sum of at least $20 million, and to be subjected to claims and other damages under Section 16(b) of the Securities Exchange Act of 1934 for which recovery is sought against said defendants to counterclaim.

56. Plaintiff and defendant to counterclaim, Tenneco, Inc. knowingly aided and abetted, acted in concert with, and agreed with defendants to counterclaim Old Kern, Cochran and Montgomery, and each of them, in the above-averred breaches of fiduciary duties. In addition Tenneco, Inc., and plaintiff encouraged, participated in, and received the benefits of the Plan which they knew was approved because of said breaches of fiduciary duties and was unfair to Occidental and the other shareholders of Old Kern, as hereinabove set forth. Finally, plaintiff agreed to assume the liabilities of Old Kern, and defendant to

counterclaim Tenneco, Inc., agreed to indemnify defendants to counterclaim Old Kern, Cochran and Montgomery for all liabilities resulting from the above-averred course of business. Whether because of their independent wrongs, as aforesaid, or by reason of the agreement of indemnity and/or the receipt of Old Kern's assets for an inadequate consideration, plaintiff and defendant to counterclaim Tenneco, Inc., are responsible for damage sustained by Occidental in an amount in excess of $20 million.

AS AND FOR A FIFTH SEPARATE DEFENSE TO COUNTS III AND IV AND A SEVENTH COUNTERCLAIM AGAINST PLAINTIFF AND DEFENDANTS TO COUNTERCLAIM HEREIN

57. Paragraphs 27 through 30, 42, 44 and 45 of this amended answer and counterclaim are, by this reference, incorporated herein as though said paragraphs were fully set forth.

58. Disclosure by defendants to counterclaim Old Kern, Cochran and Montgomery of the true value of the assets of Old Kern to Occidental and to its other shareholders would have required Old Kern, Tenneco, Inc., and plaintiff to renegotiate a different and higher proposal, and would have led to a closing date later than December 9, 1967.

59. By reason of the failure of said defendants to counterclaim Old Kern, Cochran and Montgomery, to make such disclosures, and by reason of the concurrence and collaboration of plaintiff and defendant to counterclaim Tenneco, Inc., the Old Kern Shareholders, on or about July 17, 1967, approved the Plan, and it was possible to close prior to December 9, 1967.

60. Occidental seeks recovery against plaintiff, Old Kern, Tenneco, Cochran and Montgomery for all damages it has sustained by reason of the acts of the plaintiff and the defendants to counterclaim, as aforesaid.

Defendant's Amended Answer and Counterclaim

WHEREFORE, defendant, Occidental Petroleum Corporation, demands judgment

(a) dismissing the complaint as to it, together with the costs and disbursements of this action; and

(b) against the plaintiff Kern County Land Company (a Delaware corporation), and defendants to counterclaim Tenneco, Inc., (a Delaware corporation), 600 California Corporation (a dissolved California corporation), Dwight M. Cochran and George C. Montgomery, individually and as officers and directors of 600 California Corporation

(i) On the first, second and third counterclaims and cross-claims in an amount equal to any judgment obtained against it by plaintiff in this action, or by any other stockholder of Old Kern in any other action, arising out of or resulting from the August 30, 1967 closing and transfer of Old Kern's assets in exchange for shares of $5.50 Cumulative Convertible Preference Stock of Tenneco, Inc., plus interest, together with an amount sufficient to reimburse defendant for all expenses and attorneys' fees incurred by it in defending the claims and actions resulting from the contemptuous acts and breach of contract as aforesaid of said plaintiff and said defendants to counterclaim;

(ii) on the first and second counterclaims and cross-claims for the amount of expenses and attorneys' fees incurred by it because of said wilful, deliberate and contemptuous acts and breach of contract by said plaintiff and said defendants to counterclaim, as aforesaid, in defending the instant action, in the event the complaint is dismissed;

(iii) on the third counterclaim and cross-claim in an amount in excess of $20,000,000, together with punitive or exemplary damages;

(iv) on the fourth counterclaim and cross-claim in an amount in excess of $20,000,000;

(v) on the fifth counterclaim and cross-claim in an amount in excess of $20,000,000;

(vi) on the sixth and seventh counterclaims and cross-claims in such amounts as defendant may be held liable to pay pursuant to Section 16(b) of the Securities Exchange Act of 1934 to any party suing on behalf or in the right of Old Kern and/or its shareholders;

together with interest at the rate of 7% per annum, costs and disbursements. and such other further and different relief as to the Court may seem just and proper in the premises.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON

By: SIMON ROSE
A member of said firm
Attorneys for Defendant
Occidental Petroleum Corporation
. 477 Madison Avenue
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Extracts from Complaint in No. 67 Civ. 3291, *Isaac Mukamal* v. *Occidental Petroleum Corporation, et al.*

• • •

31. The 887,000 shares of Kern owned by the defendant Occidental constituted, and in fact was employed by Occidental, as a substantial threat to the approval of said Agreement and Plan of Reorganization. The voting of said shares in favor thereof, or at least not in opposition thereto, was necessary to secure its approval.

• • •

33. On or about June 2, 1967, Occidental entered into an agreement with Tenneco Corp. whereby and whereunder Tenneco Corp. agreed to pay Occidental $8,866,230 or to purchase the latter's Tenneco Preference Stock for $93,095,-415, on condition that said Agreement and Plan of Reorganization was consummated.

34. The purpose and effect of the aforesaid agreement of June 2, 1967 was to induce defendant Occidental not to oppose the approval of said Plan and Agreement of Reorganization, and Occidental withdrew its previous opposition.

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Extracts from Answer of Defendants Tenneco Inc. and KCL Corporation to Complaint in No. 67 Civ. 3291, *Isaac Mukamal* v. *Occidental Petroleum Corporation, et al.*

• • •

26. Deny each and every allegation set forth in paragraph 31.

• • •

28. Deny each and every allegation set forth in paragraph 33, except admit that on or about June 2, 1967 Occidental and Tenneco Corporation entered into an Option Agreement, reference to which is respectfully made for the full terms and contents thereof.

29. Deny each and every allegation set forth in paragraphs 34, 35, 36, 37 and 38.

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Extracts from Complaint in No. 67 Civ. 4977, *Colonial Realty Corporation* v. *Occidental Petroleum Corporation, et al.*

• • •

10. (a) Following Occidental's tender offer and for several weeks thereafter, Kern's management discussed with a number of other companies, including Tenneco, the possibility of a merger or similar combination. Beginning in or about the middle part of May 1967, Kern's management conducted negotiations with Tenneco looking to a sale of Kern's assets to a subsidiary of Tenneco.

Extracts from Complaint in No. 67 Civ. 4977, Colonial v. Occidental

(b) Occidental, however, wanted control of Kern for itself. It therefore opposed any plan looking to a merger or similar combination of Kern with a company other than Occidental, including the plan then being negotiated between Kern and Tenneco. Occidental threatened to vote against such plan and to solicit Kern's other stockholders to vote against it. To that end, in the latter part of May 1967, Occidental filed two actions against Kern in the Superior Court of California for the County of San Francisco (Civil Nos. 579283 and 579464) to compel Kern to disclose to Occidental the list of Kern's stockholders and other information. As the holder of about 20% of Kern's outstanding stock, and by reason of its large financial resources and the comparatively small stockholdings of Kern's management, Occidental was in an advantageous position to conduct a successful proxy fight against the aforesaid plan.

11. (a) Tenneco thereupon agreed with Kern's management that it would eliminate Occidental's opposition by paying it a substantial premium for approving and acquiescing in the proposed plan. Occidental agreed to and did accept such premium in return for approving and acquiescing in the proposed plan. As a result, and with the consent of Kern's management, Tenneco paid a price for Kern's assets which was substantially less than it would have been but for the payment of such premium to Occidental.

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(b) The option contract was highly advantageous to Occidental since the sum of $8,886,230 was wholly out of

proportion to the value of the option. In fact, the option had minimal or no value. The foreseeable market price of the Preference Stock, in light of its dividend rate, conversion privilege and other circumstances, was in the neighborhood of $90 a share. The likelihood that the market price would rise above 105 during the short exercise period from December 10 to December 31, 1967, was so remote as to be negligible. Moreover, Tenneco Corporation did not really want the Preference Shares; it announced that, if it should exercise the option, it did not intend to purchase the Preference Stock as an "investment".

(c) The true consideration for the $8,866,230 payment to Occidental was not the grant of the option, but Occidental's agreement (i) to vote its 886,623 Kern shares for the approval of the Plan if such vote should be necessary for the adoption of the Plan; (ii) not to solicit the adverse votes of other Kern stockholders; (iii) to discontinue the actions it had brought against Kern as hereinbefore alleged; and (iv) not to oppose the Plan in any other manner.

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17. Under date of June 16, 1967, Kern called a special meeting of its stockholders to be held on July 17, 1967, for the purpose of voting on the approval of the Plan and the dissolution and liquidation of Kern. Occidental first issued a proxy to vote its 886,623 Kern shares for the approval of the Plan and the dissolution and liquidation of Kern; but it withdrew the proxy when it appeared that Kern's management had secured sufficient proxies from other stockholders to assure an affirmative vote on these propositions.

Extracts from Answer of Defendants in No. 67 Civ. 4977, Colonial v. *Occidental*

At the meeting of July 17, 1967 the holders of a majority of Kern's outstanding stock voted to approve the Plan and the liquidation and dissolution of Kern.

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Extracts from Answer of Defendants Tenneco Inc., Tenneco Corporation and KCL Corporation to Complaint in No. 67 Civ. 4977, *Colonial Realty Corporation* v. *Occidental Petroleum Corporation, et al.*

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9. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph 10, except admit that Kern's management discussed the possibility of an acquisition of Kern's assets by a subsidiary of Tenneco Inc. with the management of Tenneco Inc. and that, on information and belief, defendant Occidental filed actions against Kern in the Superior Court of California for the County of San Francisco.

10. Deny each and every allegation set forth in paragraph 11.

• • •

12. Deny each and every allegation set forth in paragraph 13, except admit that on or about June 2, 1967 Occidental and Tenneco Corporation entered into an Option Agreement, reference to which is respectfully made for the full terms and contents thereof.

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Extracts from Second Amended Complaint in No. 67 Civ. 2858, Abrams v. *Occidental*

14. Admit, on information and belief, the allegations set forth in the first sentence of paragraph 17, and deny each and every allegation set forth in the remainder of said paragraph, except admit that on or about July 17, 1967 the holders of a majority of Kern's outstanding shares voted to approve the Plan of Reorganization and the liquidation and dissolution of Kern.

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Extracts from Second Amended Complaint in No. 67 Civ. 2858, *Stephen Abrams* v. *Occidental Petroleum Corporation, et al.*

• • •

10. In June, 1967, Occidental and Tenneco entered into an agreement, with the approval of the directors of Kern, and in the negotiation of which they participated, whereby Tenneco paid Occidental $8,866,230 and Occidental agreed either to vote its shares of Kern stock in favor of the proposed sale of Kern assets to Tenneco or to refrain from voting its shares against such proposed sale, and to give to Tenneco the right to purchase at $105.00 a share the Tenneco stock which Occidental would receive as a stockholder of Kern when the sale of assets was approved by the Kern stockholders and the transfer of assets was effected. The parties agreed further that if Tenneco did not exercise its right to purchase said stock from Occidental, the latter would keep the $8,866,230, but if Tenneco did exercise this

right, the $8,866,230 would be applied to the purchase price of the stock.

11. On July 17, 1967, the stockholders of Kern voted to authorize the sale of the assets of Kern to a wholly-owned subsidiary of Tenneco in exchange for 4,330,440 shares of the $5.50 Cumulative Convertible Preferred stock of Tenneco and voted that such stock should be distributed to the stockholders of Kern on a share for share basis upon consummation of the transfer of the Kern assets. Occidental either voted its stock in favor of such sale and distribution or refrained from opposing these measures.

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34. As the owner of approximately 20% of Kern's outstanding common stock, the largest single block of such stock owned or controlled by a single person or entity, Occidental possessed a power greatly to influence the determination whether Kern would sell its assets to Tenneco in exchange for Tenneco's $5.50 Cumulative Convertible Preference Stock.

35. In order to persuade Occidental either to support or to refrain from opposing the aforesaid proposed sale of assets, Tenneco and Kern arranged to have Tenneco pay Occidental $8,866,230. This payment took the form of the purchase by Tenneco of a right to buy for $105.00 a share the Tenneco stock which Occidental would receive for its Kern stock, but its real purpose was to secure Occidental's vote in connection with the aforesaid sale of Kern assets. It was understood and agreed between the parties that if Tenneco did not exercise this option, Occidental would retain said sum of $8,866,230, and it was further understood

that Tenneco would not exercise its option until some time after December 9, 1967.

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Extracts from Answer of Defendants Tenneco Inc. and KCL Corporation to Second Amended Complaint in No. 67 Civ. 2858, *Stephen Abrams* v. *Occidental Petroleum Corporation, et al.*

• • •

10. Denies each and every allegation set forth in paragraph 10, except admits that on or about June 2, 1967 Occidental and Tenneco Corporation, a subsidiary of Tenneco, entered into an Option Agreement, reference to which is respectfully made for the full terms and contents thereof.

11. Denies each and every allegation set forth in paragraph 11, except admits that on June 17, 1967 the stockholders of Old Kern voted to approve and adopt the aforesaid Plan, that Occidental did not vote at said meeting, and that Occidental stated its position with respect to said Plan in letters to Old Kern dated July 14, 1967 and July 25, 1967, reference to which is respectfully made for the full terms and contents thereof.

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25. Denies each and every allegation set forth in paragraph 34.

26. Denies each and every allegation set forth in paragraph 35, and respectfully refers to the said Option Agreement for the full terms and contents thereof.

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Extracts from Deposition of Walter R. Davis, taken December 11, 1968

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(12) Q. Was there any discussion at any conferences which you attended with regard to the possible risk of a (13) tender offer at $83.5 a share? A. The only risk that I could remember being discussed was that we would get some portion of shares or I think the initial tender offer was 500,000 shares, that we would be able to acquire that and not be able to dispose of it at the price which we paid and be sort of locked in with that amount of investment involved in Kern County without being successful in any further offers or any negotiations that might take place after the original tender offer.

• • •

(25) A. I called Mr. Cochran, I believe, on Friday afternoon and I don't know what the date was and asked him if they had made any decision relative to a further discussion about our offer and he said that they had already made a deal and I said "Would you be at liberty to tell us what it is?" and he said I could read it in the morning newspaper.

Extracts from Deposition of Walter R. Davis

Q. Did he tell you with whom the deal was made? A. No. All he said was I could read it in the morning newspaper.

• • •

(30) Q. You were then discussing the possibility of Tenneco purchasing your Kern stock? A. Yes, or someone and I recommended Tenneco.

Q. Did you thereafter communicate with Mr. Symonds? A. Yes.

Q. When was that? A. I don't know the date.

Q. How long after your last conversation you just described with Dr. Hammer? A. Within 24 or 48 hours. It was rather quickly.

Q. What was the result of that communication? A. As I recall, he said that he was very busy and that he wouldn't be able to see me right away, that he would examine his schedule and would leave either his phone number or a message with his secretary if I would call back, which I did, and then he agreed to see me at his home and that date was about the last day of May, as I recall.

Q. How long after your initial conversation with Mr. Symonds did you get to see him, approximately? A. A couple of days, I would say, two or three days.

Q. During this period of time that you were (31) discussing matters with Dr. Hammer as you have discussed, was Occidental considering the possibility of any legal action in connection with the Kern County sale of assets to Tenneco? A. I did not have anything to do. This was handled by the attorneys in San Francisco.

Q. Do you know what was done with regard to any court action at that time? A. I read it in the paper. I was not

in Los Angeles and wasn't intimately familiar with it. I did read in the paper they had asked for the records of Kern County Land and the stockholder list, I recall that.

Q. Do you know who in the company was in charge of that endeavor? A. Dr. Hammer talked directly with the attorneys themselves, as I recall.

Q. What attorney did he talk with, do you know? A. He talked with Bruce Mann or Al Brown with Pillsbury, Madison.

Q. Do you know whether in response to the efforts made to see the records people from Occidental were able to see any of the Kern County records? A. I do not. (32)

Q. Prior to your conversation with Mr. Symonds or prior to the date at which you were supposed to meet with him, did you receive a report? Did anyone from Occidental inform you what had happened with regard to the examination of the records? A. No, I had not.

Q. Did you make any inquiry with regard to it? A. No.

Q. You thereafter met with Mr. Symonds, did you not? A. Yes.

Q. Where? A. At his home in Houston.

Q. That was towards the end of May? A. Yes.

Q. Who else was present? A. Mr. Scott.

Q. You were the only one representing Occidental? A. Yes.

Q. What occurred at that meeting? A. I went in and after just miscellaneous conversation, I told Mr. Symonds that I felt like Occidental did not want to get into a proxy fight with Tenneco or a fight in the Kern County situation and that I had been (33) authorized by Dr. Hammer to discuss with him the possible purchase of our stock and

he talked about values some. He said he felt like if we held the stock it would probably be at the time the deal consummated $115 or $120 a share. He felt it was a good investment and I told him that Dr. Hammer informed me that he felt we had $75, $80 million tied up and he did not want to be a minority stockholder in Tenneco and that he would prefer getting out of our position entirely if it could be done.

Q. Your discussion at this time was with regard to Tenneco's purchasing the Kern County stock? A. Yes. Mr. Symonds pointed out to me, which Mr. Mann had also pointed out to me—

> Mr. Rose: Don't go into any discussions with counsel because that is privileged.

A. Mr. Symonds pointed out to me that there was a possibility of a 16B problem.

Q. You knew what he was talking about, I take it? A. Well, I just found out. I told him, "Mr. Symonds, you are talking over my head."

Q. You found out before you met Mr. Symonds? A. He sort of crystallized the problem for me. I told him that this was something which I did not have any (34) personal knowledge of. I knew about the officers' side, but not about the 10 per cent and he said, "Well, it was a problem," and I said, "Well, obviously we can't make any disposition of our stock or make any other moves which are illegal but I feel as smart lawyers you got and as smart lawyers we got, you ought to be able to figure out to do this thing to

make it legal. I am not in a position to discuss the legalities of this."

And he suggested we meet in Mr. Daum's office which was the next day or as soon thereafter and meet our lawyers for them to get together and figure out how to do it.

Q. Did you tell Mr. Symonds on that day what Bruce Mann had discussed with you on the 16B question? A. No, I wasn't conversant with this problem.

• • •

(36) Q. What occurred at that meeting in Mr. Daum's office? A. Most of the discussion, as I recall, revolved around the legal technicalities of 16B problems and how, if possible, these, these problems could be avoided. Much of it was technical discussion. I am not talking about cases and so forth which I am not acquainted with. One portion of it, when we talked of options, called Donaldson, Lufkin & Jenrette, which was an investment banking firm in New York and asked them what they felt like a call, which is what I call it, a call on (37) stock that was selling at that time would sell for, normally sell for. They told me something between $9 and $12 depending on if there were any conditions outside of the normal call that you would find in the open market.

Q. You were talking about the Kern County stock? A. Yes.

Q. What was Kern County stock selling for at that time? A. I don't know. As I recall, it was 95 or 96, I am not positive of that.

Q. On the previous day, in your conference with Mr. Symonds, you said it was he who had first raised the question of the possible 16B problem of liability? A. Yes.

Extracts from Deposition of Walter R. Davis

Q. At the meeting in Mr. Daum's office, was a suggestion made that the option that you described be for Tenneco preference stock which Occidental would get in exchange for Kern stock? A. I am sorry, I just don't know the technical details that are involved in this matter or why they put down one stock in preference to another. I am just not legally acquainted with many of the things that you probably know all the details to. I don't know, I am sorry. (38)

Q. Other than two lawyers that you have mentioned and yourself, was there anyone representing Occidental at this meeting in Mr. Daum's office? A. No.

Q. Were you in communication by telephone with any one of the Occidental officials during the course of these meetings? A. After a preliminary draft had been drawn of the option agreement and our attorneys telling me they felt like this was satisfactory under certain conditions, I called Dr. Hammer who was in London at that time and reviewed it with him and asked him if it met with his approval.

Q. What was his response? A. He said if Mr. Al Brown and Mr. Bruce Mann felt like it was satisfactory, it was satisfactory with him.

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(39) Q. The discussions you are now describing took place in Mr. Daum's office over one or two days? A. As I recall, we spent one day talking about the approach to the problem and looking up cases and so forth then the attorneys got together that afternoon to draft some sort

of document which the next day they sat down and worked out the wording of, if I remember correctly.

• • •

(77) Q. What did Dr. Hammer say about how it should be handled if he did say anything on the subject? A. He never has been too critical of it, really. I think he felt that probably legally it wasn't handled properly but I had depended on the advice of attorneys and he didn't blame me for it.

• • •

(79) *Examination by Mr. Hyde*:

Q. Mr. Davis, with reference to this financing arrangement with Chase Manhattan, was that a line of credit to be used in the event of a tender offer that you were discussing? A. Yes. (80)

Q. What was the amount of the line of credit that was sought? A. I don't remember because there were several different banks and I do not know the amounts that were involved in the different banks.

Q. I take it from your answer then that Occidental sought credit from various financing institutions with respect to this tender offer and that Chase Manhattan was just one of those? A. Yes.

Q. Do you know then the total amount of credit that was sought by Occidental from all of the various institutions? A. I do not.

Q. Do you have any idea of the approximate amount? A. No.

Q. Do you know the number of shares of Kern stock that Occidental had in mind acquiring when it was discussing

these financial arrangements? A. I wasn't in on that discussion, as I recall, but I think it was something in the neighborhood of 2 million shares, if my memory is correct.

Q. Did Occidental in fact obtain enough credit to purchase 2 million shares or up to 2 million shares? (81) A. We obtained—the only statement that I know about this is we obtained more than enough credit to purchase 2 million shares.

Q. You know that you had enough credit to purchase 2 million shares before making any tender offer? A. Yes.

Q. Mr. Davis, what were the names of the other banks? A. I don't know. In fact, I went to the Chase just kind of accidentally. I did not go to negotiate for the loan.

Q. Do you know if Chase happened to be the principal source of the financing? A. I do not know.

Q. I think you testified to participating in various discussions with respect to a possible tender offer for Kern stock prior to the decision on the Sunday, I believe that would be the 7th of May, to make such a tender offer. In the course of those various discussions and in the discussion on May 7th, what was said with respect to the number of shares Occidental would seek to acquire? A. The final conclusion was that we would tender for 500,000 shares and see how this tender offer came, what kind of response would we get to the 500,000 shares? (82)

Q. You say that was your final conclusion, but what was the preliminary discussion that led up to that conclusion with respect to the number of shares you had tendered for? A. I don't quite follow your question. You mean what made us tender for 500,000 shares, is that your question, instead of 2 million or a million?

Extracts from Deposition of Frederick Warren Hellman

Q. Let me break it down. Was there discussion at some point tendering, to take an example, for 2 million shares or 1 million shares or some other number? A. Yes, there was a discussion about tendering for 2 million shares and as I recall, the reason that they felt like that, if the 500,000 shares were available at the prices which we were offering, then they would wait and tender after they saw how the response went and it was just that they didn't want to end up with a large minority interest and when I say large, they wanted to see how this came, to see the reception they got from the public before they tendered any further. If that is answering your question, that is the best I know how to answer it.

Q. Is it fair then to say it was Occidental's decision that in the event the initial tender for 500,000 (83) drew a favorable response, there would be a follow-up tender for additional amounts up to 2 million shares? A. Right.

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Extracts from Deposition of Frederick Warren Hellman, taken May 27, 1969

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(12) Q. All right. Now, prior to the time you got to California on May 6th, had you arrived at a price that you would recommend that Occidental should use in connection with the tender offer? A. I would say yes.

• • •

(13) Q. What value had you put for the purpose of tender? A. I considered that a price—to the best of my

recollection, that a price in excess of $80 would be necessary.

Q. How did you arrive at that? A. To the best of my recollection, we arrived at that in considering where the security had been traded in recent months, where the—in the past couple of years—where the volume for the stock had—at what prices the volume for the stock had been, and what premium over market I thought would be sufficient to cause a considerable amount of stock to be tendered.

Q. You said in excess of $80. That could mean from $80 on up. Did you have any ceiling? A. Well, I thought $85 was the price that I hoped—well, the price that—I felt that $85 was the price at which they would get a lot of stock.

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(23) Q. How many shares were you talking about in connection with the tender offer? (24) A. The decision was made to tender for 500,000 shares initially.

• • •

Q. Was there any discussion of, say, 2 million shares? A. Yes.

Q. When was that discussion had? A. Prior to the—during the course of the day.

Q. Were you advised on that Sunday, May 7th, that financial arrangements had been made to finance the tender offer? A. Yes.

Q. Had you had anything to do with making those financial arrangements? A. Yes.

Q. Tell us about that? A. One of the banks, the Chase, asked us to give them what is called an underwriting

takeout letter in order to provide their agreement—in order for them to agree to put up, I believe, $25 million. And we did give such a letter.

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(34) Q. All right. What is your first knowledge, if you have knowledge, that arrangements were made for proxy solicitations? A. Well, I do have knowledge. Arrangements to the best of my recollection were made the following week with four proxy solicitation firms.

Q. Who made the arrangements? Did you handle that? A. We assisted in that. However, the arrangement were with Occidental. In other words, we don't hire proxy solicitors.

Q. I understand, but you did assist in acquiring the— A. We talked to the proxy solicitors.

Q. Who were they? A. Georgeson & Company, Dudley H. King—F. Dudley, Kissel, and Squires & Company.

• • •

(44) Q. And I take it that between the 8th and the 16th there were no discussions in which you participated concerning the value of Kern County Land stock? You said you returned to California on the 16th. A. I don't recall any discussion as to the value.

Q. You previously testified that you made no further investigation of Kern during that period, is that correct? A. That's correct.

Q. Why did you return to California on the 16th? A. To meet with Mr. Montgomery and Mr. Cochran.

Q. At whose suggestion? A. Well, that's hard to say. I called Mr. Montgomery at the suggestion of Dr. Hammer.

Extracts from Deposition of Frederick Warren Hellman

Q. Do you know when that call was made? A. That call was made the day before I went out (45) with Mr. Davis. In the morning. So that whatever date the meeting with Mr. Montgomery and Mr. Cochran was held it was the previous day in the morning.

Q. Did I understand you to say you went out with Mr. Davis? A. Right.

Q. He had come into New York? A. He was in New York, yes.

Q. Do you know the duration prior to the 16th he was in New York? A. I know he was in New York the day before. I don't know prior to that.

Q. For what purpose was a call made to Mr. Montgomery by you? A. It was Dr. Hammer's desire that some attempt be made to once again arrange for a merger between the two companies. A tax free exchange of some sort.

Q. When did you get that information? A. Well, I always had that information. I am sorry, which information?

Q. You stated you went back on the 16th at the insistence of, I guess, Dr. Hammer, to do something toward a possible merger with Kern County Land. Now, was that told to you in New York by Davis (46) or did you talk with Dr. Hammer about that? A. The desire to merge rather than continuing a cash tender offer was always present. The decision to make another attempt was made the morning prior to the time—to the date that Mr. Davis and I flew out there.

Q. All right. Now, in connection with that decision to make an attempt, what was discussed and by whom as to price, offer, et cetera? A. There was a discussion in Dr. Hammer's office in New York as to various possibilities—

as to the possibility of the issuance of an Occidental convertible preferred stock for the Kern County Land stock.

Q. When was that discussion had? A. That discussion went on through a portion of the day prior to the day we flew to California.

Q. Not before? A. Not that I recall.

Q. You were present at that discussion? A. I was present at that discussion.

Q. What was discussed in terms of an offer that Occidental might make? A. That Occidental would offer—this is a little tough because it's quite a few years ago—it's a few years ago—that Occidental would offer a convertible (47) preferred stock, convertible into Occidental common stock in some ratio that would give the Kern County Land stockholders in excess of $90 a share for their stock. No final plan or final determination of what would be the package was made at the meeting with Dr. Hammer.

Q. And that was— A. Just arrangements were discussed.

Q. —that was not earlier or later than the 15th, would that be about right? A. It certainly wasn't later and the only discussion I can recall was on—happened on the 15th.

Q. Did you arrive at that meeting on the 15th in Dr. Hammer's office at what proposal would be made definitely? A. No.

Q. Then I take it that you and Mr. Davis flew on to California? A. That's right.

Q. Did Dr. Hammer go with you? A. He did not.

Q. He remained in New York? A. So far as I know. He didn't go with us.

Q. All right. Now you called Mr. Montgomery from (48) New York? A. Right.

Extracts from Deposition of Frederick Warren Hellman

Q. And that was the day before you went out? A. That was the day before I went out.

Q. That was about the 15th or 16th? A. Yes.

Q. What did you tell Mr. Montgomery? A. That it was Dr. Hammer's hope, as it had been all along, that a friendly arrangement could be worked out, that he was desirous of having a meeting with Mr. Davis—or of seeing that a meeting occurred with Mr. Montgomery and Mr. Davis.

Q. What did Mr. Montgomery say? A. That he would be happy to meet with us.

Q. Was a definite date fixed? A. The next day.

Q. Which would have been the 17th? A. Which would have been—the day that we flew out there. I will just have to go back through my files and find out whether it was the 16th or 17th.

• • •

(124) Q. You stated also that at some time at about the time the tender offer was being discussed four firms were hired in connection with proxy solicitation, is that (125) correct? A. Right.

Q. Was that the result of a discussion in which you participated? A. Yes.

Q. When and where did that discussion take place? A. I don't accurately recall. The discussion would have been either just over that weekend prior to the tender or just after. It's a detail that doesn't—that often doesn't come up until the last minute.

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Q. What was the substance of the discussion with regard to the hiring of these four firms? A. That if this was

going to turn into a battle of any sort these individuals could be—these organizations could be helpful in being successful in such a battle.

Q. At that time was a proxy fight being contemplated? A. No. This has come up a couple of times today. These individuals are often hired for purposes other than proxy fights. In tender solicitation or other types of stockholders' relationships, and I am not sure that in this case that they were hired with a view towards a proxy (126) fight. I think it may have been more with a view towards making the tender successful or a subsequent merger agreement or other purposes. I mean, companies regularly hire Georgeson, for example, to see if they get a—an exchange offer is accepted or for purposes other than—

Q. To see that stockholders vote, is that right? A. Or that stockholders tender their stock.

Q. Right. You made arrangements with these four companies, did you not? A. That's right.

Q. For their retention? What did you tell them was the purpose of the hiring? A. To assist Occidental in the initial instance in obtaining tenders, and for whatever purposes subsequently they might be required.

Q. Such as? A. Oh, if it became—if it turned from a tender offer to an exchange offer, to solicit exchanges. If it ultimately came to some sort of proxy battle to assist in that. But that would have been a long way down the road at the time we are talking about.

Q. But you did discuss that possibility with them? A. I am sure we did. I don't remember a specific conversation with them. They are not hired—they aren't (127) hired. I don't believe, for that purpose.

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Extracts from Deposition of Dorman L. Commons, taken June 27, 1969

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(41) Q. Now, before you left New York—I am talking about you now—did you make any arrangements for advertising space in the Wall Street Journal or other trade publications? A. I did not, but Lehman did.

Q. Did you make any arrangement with any proxy solicitors? A. Yes, we did.

Q. Did you do that or did Mr.— A. No, this was done by Lehman at their suggestion.

Q. Do you know who was contacted? A. Yes, Georgeson—I don't know the full names—there is one I think called Georgeson, Dudley King and Squires.

Q. At whose suggestion were these proxy solicitation firms employed? A. At Lehman's.

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(48) Q. Was there any discussion general or otherwise as to attempting to arrive at a valuation of Kern? A. No, I don't think so. The general discussion was one of what—in view of the lack of anything other than published information on the company—what was a safe price at which we could tender and be reasonably sure that we were not taking any great risks if we acquired the company.

Q. What was your thought on the price of the (49) tender offer? A. Well, I was holding out for about $75 a share. I wanted to stay somewhere in the lower range.

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Extracts from Deposition of Dorman L. Commons

(64) A. That's right. There were discussions in New York, there were discussions again in Los Angeles during that five day period of time as to the inherent risks of making the tender offer and how many shares we would have to acquire in order to assure ourselves of control. And I believe the statement was made that there would be no question of our having effective control with 40 per cent of the company and that we might therefore have to go that far, but no decision was made to go that far.

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(105) Q. Was there any such discussion after the option agreement was entered? A. There was in house discussion, that is, between myself and Mr. Wachtel as to what would happen if Tenneco (106) did not exercise the option.

Q. What was that discussion and when was it held? A. It principally had to do with the position we might find ourselves in if we wound up as a minority stockholder locked in with $80 million invested in Kern County stock. I don't recall that we discussed what alternative routes of action should be taken. That wasn't our province. But there were financial considerations which I was concerned with.

Q. And this was before or after the option agreement was entered into? A. That's after the option agreement.

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Extracts from Deposition of Henry Gardiner Symonds, taken August 5, 1969

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(41) Q. Was there any discussion either on May 30th or June 1st or 2nd to the effect that if Tenneco bought the Kern stock from Occidental, Occidental would either vote in favor of the sale of assets or not oppose the sale of assets from Kern to Tenneco? A. To the best of my knowledge, those subjects were not mentioned.

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(44) Q. In your conversations with Mr. Davis over the May 30th-June 2nd period, was there any mention made by anyone of the possibility of a proxy fight by Occi- (45) dental in opposition to the proposed sale of Kern assets to Tenneco? A. If so, I don't remember it. It was obvious that they could but I don't remember any such discussion.

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(73) Q. Did Occidental have anything at all to do with the transfer of the option from Tenneco to Loeb, Rhoades? A. None.

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(94) Q. I gathered from your answers to Mr. Rose that you thought that the terms of the option agreement eliminated the possibility of a 16(b) claim against Occidental? A. I would say that I thought that. I say that I thought that a six-month hold period, as far as I knew the law and I am not a lawyer, would have eliminated that claim.

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Extracts from Deposition of Dwight M. Cochran, taken August 6, 1969

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(12) Q. How did you happen to meet with them on that day? A. I met with them because Tenneco Corporation was interested in exploring the possibility of making an offer to us for our company.

Q. When did you first learn that? A. Well, we first learned it, really, on that day. They had expressed an interest in coming out to talk to (13) us by telephone prior to that time, but not to me. I didn't engage in the telephone conversation.

Q. What occurred at the meeting that you held on May 15, 1967? A. Mr. Symonds indicated that they were seriously considering making a proposal to us for an exchange of shares of our two corporations, and he wanted to feel us out about our feelings on the matter. He outlined in a very general way what they had in mind in the way of the nature of the offer, but nothing specific was stated at that time. We indicated to him we were interested in receiving a more detailed and more specific proposal.

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(60) Q. Did you state in June of 1967 that the option agreement between Occidental and Tenneco removed the possibility of significant opposition to the sale of the Kern assets in Tenneco? A. No.

Q. Did anyone on behalf of Kern make that statement? A. It was reported in the press that a spokesman for Kern made such a statement and I haven't been able to locate that spokesman.

Extracts from Answers of Defendant to Plaintiff's Interrogatories in No. 67 Civ. 2858 in Abrams v. *Occidental*

Q. Have you tried very hard? A. Yes. I tried our Public Relations Department. They only had two people in it. They both denied it but I suspect one of them did it. They did it without authority from anybody.

Q. It was a fact, was it not? A. It turned out to be a fact. (61)

Q. That the result of the option agreement was that it removed the possibility of significant opposition to the sale of the assets? A. It turned out they didn't oppose. They didn't vote for it, either.

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Extracts from Answers of Defendant Kern County Land Company ["Old Kern"] to Plaintiff's Interrogatories in No. 67 Civ. 2858, *Stephen Abrams* v. *Occidental Petroleum Corporation, et al.*, filed February 27, 1968.

Interrogatory No. 27: State whether the securing of Occidental's support to the proposed sale of the assets of Kern to Tenneco or an agreement that Occidental would not oppose the proposed sale was first proposed by Kern or someone on its behalf, or by Tenneco or someone on its behalf, and set forth the circumstances under which the proposal was made, including the time, place, form of the proposal, what individual actually made the proposal and to what individual such proposal was made.

Answer: Kern does not have any knowledge with respect to the information sought except that neither Kern nor anyone on its behalf proposed the securing of Occidental's support to the proposed Plan.

Excerpts from Transcript of Hearing before Judge William B. Herlands, March 15, 1968

(DOCUMENT No. 64)

(53) The Court: You may continue, Mr. Rose.

Mr. Rose: Before I say a word about the case law, may I just refer to the point that was made by my opponents about the advocation made by the SEC to Occidental for a ruling. The papers contain extensive references, extracts from the letters that were sent to the SEC.

One thing is clear, and that is that there was no concession of any kind by Occidental that the circumstances created a 16(b) liability in this case.

What they were endeavoring to do—and it would seem to have been a reasonable and proper precaution for a company to take—and that was to put the whole question beyond (54) peradventure by, if possible, obtaining such a rule in order to avoid the harassment and expense of litigation which has now resulted.

One thing is clear, and that is that the failure of the SEC to take any action certainly cannot be deemed to be any recognition or admission that the circumstances of this case involve a 16(b) liability.

The Court: Mr. Rose, you say that the SEC did not take any action?

Mr. Rose: It isn't a case of a no-action letter, your Honor. It was merely that the letters were sent and the SEC just didn't pass a rule.

The Court: Did they react in any way?

Mr. Rose: There were discussions, your Honor. There was no formal communication intimating what position they were taking.

The Court: I see.

There was no ruling?

Mr. Rose: There was no ruling of any kind.

Excerpts from Transcript of Hearing before Judge William B. Herlands, March 15, 1968

The Court: There was no intimation of administrative action or position?

(55) Mr. Rose: To the best of my knowledge, your Honor, I think I can safely make this representation: that there was no such intimation.

The Court: The fact that the SEC is not appearing in connection with these motions as amicus, although it has appeared in comparable situations, is there any significance to that?

Mr. Rose: I would say this, your Honor:

If my opponents want to derive any comfort from the fact that application had been made to the SEC one would have expected that they would have endeavored to solicit the intervention of the SEC as amicus in this case.

The very fact that they have not appeared in that capacity, I might well draw the same kind of inference that my opponents were trying to draw from their position with respect to the application.

Your Honor, I may be able to find authority. I think there is authority for the proposition that the fact that the SEC failed to take any action is not to be deemed an admission of any kind. I would like the (56) opportunity of submitting a short memorandum on that, if I may do so?

The Court: Yes, of course.

* * *

(59) Mr. Rose: The fact that Occidental did not vote in favor of the proposal and the fact that under California law this is the effect of a negative vote; the fact that Occidental had no insider information at any time throughout the transaction.

The Court: Despite its position, such as it may have been?

Mr. Rose: Despite the fact that it had acquired more than ten per cent of the stock of Kern, that at no time up

to the consummation of the Kern-Tenneco transaction did Occidental have insider information.

* * *

(62) Mr. Hyde: Your Honor raised a question about action taken by the SEC.

It does appear from a letter which Occidental's Los Angeles' counsel wrote—and I will quote them:

On July 12, 1967, the secretary of the SEC wrote to Washington counsel of Occidental advising them that:

> "The Commission considers it undesirable to publish for comment any proposed rule in (63) this area at the present time."

Thereafter Occidental made a second try, and there was a lengthy hearing on the 29th of August before the full Commission, followed by the 30-page letter from Los Angeles counsel, which I have mentioned.

The Court: Followed by a letter of counsel or by the SEC? We are talking about what came out of the SEC, not what went to the SEC.

Mr. Kaufman: Nothing came out of the SEC.

Mr. Hyde: That was an attempt at reargument, your Honor.

On July 12th the SEC wrote a letter to Occidental saying that we consider it undesirable to promulgate the rule. Thereafter Occidental in effect moved for reargument. That was what I was saying. I don't know whether there was a decision.

The Court: They may have thought that administrative silence is the better part of governmental valor.

Mr. Hyde: Yes, also, your Honor, I would point out that so far as I know, and I spoke (64) to Mr. Kaufman, no one here solicited the SEC to file an amicus brief. I

Excerpts from Transcript of Hearing before Judge William B. Herlands, March 15, 1968

don't know that they are even aware of the pendency of this motion, your Honor.

The Court: I was just curious.

I think you gentlemen have imputed to my question more significance than that which I had in mind.

I was curious to know why the SEC is not here.

Mr. Hyde: They may not know about it, your Honor.

The Court: The whole situation is equivocal.

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Notice of Motion of Plaintiff Kern County Land Company for Summary Judgment

(Document No. 224)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Titles]

Sirs:

Please take notice that, upon the annexed affidavit of David R. Hyde and all of the proceedings heretofore had herein, plaintiff Kern County Land Company, a Delaware corporation, will move the Court, at a time and place to be fixed by the Court, for the following relief in Action No. 67 Civ. 4042:

(a) for an order granting plaintiff summary judgment, pursuant to Rule 56, F.R.C.P., against defendant Occidental Petroleum Corporation ("Occidental"), on all four causes of action alleged in plaintiff's amended complaint;

(b) alternatively, in the event the Court does not render summary judgment in whole against said defendant, for an order granting plaintiff partial summary judgment pursuant to Rule 56, F.R.C.P., on the issue of liability in each of the aforesaid causes of action, reserving the question of the precise amount of profit realized by defendant for subsequent determination by the Court or a Master appointed pursuant to Rule 53, F.R.C.P.;

(c) as a further alternative, in the event the Court does not grant either of the foregoing requests

for relief, for an order pursuant to Rule 12(f), F.R.C.P., dismissing each and every affirmative defense pleaded in Occidental's amended answer and counterclaim on the ground said defense is insufficient in law;

(d) for summary judgment dismissing the first, second, third and seventh counterclaims asserted by Occidental against plaintiff; and

(e) for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
May 7, 1970

Yours, etc.

CAHILL, GORDON, SONNETT, REINDEL & OHL

By DAVID R. HYDE
A Member of the Firm
Attorneys for Kern County Land Company, a Delaware Corporation
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WHitehall 4-7400

Notice of Motion of Plaintiff Kern County Land Company for Summary Judgment

To:

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Affidavit of David R. Hyde, Read in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID R. HYDE, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl, attorneys for Tenneco Inc., Tenneco Corporation and Kern County Land Company (a Delaware corporation formerly known as KCL Corporation). The latter corporation is referred to herein as "New Kern".

2. I make this affidavit in support of New Kern's motion for the following relief in 67 Civ. 4042, Action No. 3 above (referred to herein as the "*New Kern* action"). The complaint in this action, unlike the complaints in the other actions in this consolidated proceeding, asserts only causes of action arising under Section 16(b) of the Securities Exchange Act of 1934:

> (a) For summary judgment, pursuant to Rule 56, F.R.C.P., against defendant Occidental Petroleum Corporation ("Occidental") on all four causes of action alleged in New Kern's amended complaint (the "complaint"). As discussed below, these are alternative claims for relief, so that if judgment were to be rendered on the first cause of action it would not be necessary to reach any of the others.

(b) Alternatively, in the event the Court does not render summary judgment in whole against Occidental, for partial summary judgment pursuant to Rule 56, F.R.C.P., on the issue of liability in each of the four causes of action, reserving the question of the precise amount of profit realized by Occidental for subsequent determination by the Court or a Master appointed pursuant to Rule 53, F.R.C.P.

(c) As a further alternative, in the event the Court does not grant either of the foregoing requests for relief, for an order, pursuant to Rule 12(f), F.R.C.P., dismissing each and every affirmative defense pleaded in Occidental's amended answer and counterclaim ("answer") on the ground said defense is insufficient in law.

(d) Finally, for summary judgment dismissing the first, second, third and seventh counterclaims asserted against New Kern. Occidental's fourth, fifth and sixth counterclaims, which embody causes of action originally pleaded by Occidental in a separate action in the Northern District of California,* are not affected by this motion.

3. I am fully familiar with the proceedings heretofore had, and base this affidavit and motion upon facts adduced in pre-trial discovery had in these consolidated actions.

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* By order entered July 8, 1969, Judge Herlands granted a stay of Occidental's California action, without prejudice to its right to assert the same causes of action here. Occidental thereafter amended its pleadings in these actions to assert its California causes of action as either counterclaims or cross-claims.

Affidavit of David R. Hyde, Read in Support of Foregoing Motion

PRIOR PROCEEDINGS

4. Prior to the consolidation of these actions for pre-trial purposes by Judge Herlands' order dated June 14, 1968, a motion for partial summary judgment with respect to liability on one of the Section 16(b) causes of action therein alleged was made in Action No. 2, *Mukamal* v. *Occidental Petroleum Corporation, et al.*, 67 Civ. 3291 (the "*Mukamal* action"). The aforementioned June 14, 1968 order also stayed that motion for partial summary judgment "pending approval and adoption or other appropriate action in relation thereto by the general counsel designated and appointed by the Court herein". Judge Herlands' appointment of general counsel was with respect to Action No. 1 (the "*Abrams* action"), Action No. 2 (the "*Mukamal* action") and Action No. 4 (the "*Colonial Realty* action")—the three actions brought by stockholders of the former Kern County Land Company ("Old Kern")—and did not encompass Action No. 3 (the "*New Kern* action"). Accordingly, this motion is made independently of any action which may be taken by general counsel in the stockholder actions with respect to the motion for partial summary judgment heretofore made in the *Mukamal* action.*

5. Since the *Mukamal* motion for partial summary judgment was made and argued, there has been further pre-trial discovery encompassing the 16(b) issues. Four of Occidental's officers, Armand Hammer, the Chairman and chief executive officer; Walter R. Davis, Executive Vice President; Dorman Commons, Vice President and chief financial officer; and Thomas Wachtell, Vice President, have been deposed along with Frederick Warren

* The present New Kern motion is, in fact, broader than the motion previously made in the *Mukamal* action, which sought partial summary judgment as to only one of the 16(b) causes of action.

Hellman, a partner in Lehman Brothers, Occidental's investment bankers. Depositions have also been taken of Gardiner Symonds, Chairman and chief executive officer of Tenneco Inc. at the time of the transactions in issue, and of Dwight Cochran, President and chief executive officer of Old Kern at that time. In addition, Occidental has filed answers to interrogatories in the *Abrams* action.

6. The moving parties respectfully submit that the aforesaid discovery shows that the basic material facts are undisputed and that 16(b) causes of action are ripe for summary judgment.

THE BACKGROUND

7. Before outlining the various causes of action in New Kern's complaint, and the various defenses pleaded by Occidental, it may be well to recite the most pertinent underlying facts, leaving further factual discussion for subsequent portions of this affidavit where particularly relevant.

THE PARTIES

8. Although only New Kern and Occidental are parties to the 16(b) causes of action in which summary judgment is sought, it may be helpful to give a brief description of the various corporate entities involved in the underlying transactions.

9. Tenneco Inc. ("Tenneco"), a Delaware corporation, is a diversified industrial company with operations in natural gas transmission, oil and gas, chemicals, packaging, manufacturing and shipbuilding. Tenneco owns all of the common stock of Tenneco Corporation, which in turn owns

all of the capital stock or controlling interests in most of Tenneco's non-pipeline operating subsidiaries.

10. In 1967, Tenneco acquired (subject to its liabilities) the business and assets of the former Kern County Land Company ("Old Kern"), a California corporation having substantial real estate holdings, including oil producing lands, oil exploration activities, cattle ranching, cattle feeding operations, and interests in the manufacture of automotive parts, electronic systems and devices, and farm machinery and construction equipment. New Kern, a Delaware corporation and wholly-owned subsidiary of Tenneco Corporation was formed to receive the business and assets of Old Kern and to carry on its activities.*

11. Occidental is a California corporation engaged in the production and sale of oil, gas, coal, sulphur and fertilizers.

THE OCCIDENTAL TENDER OFFER

12. All of these actions arise out of a series of transactions which began with a tender offer for common stock of Old Kern which Occidental made in May 1967. On Monday, May 8, 1967, Occidental publicly announced over the Dow Jones broad tape that it would purchase up to 500,000 shares of Old Kern on a first-come first-served basis at a price of $83.50 per share net, plus a $1.50 per share commission to brokers transmitting shares. The offer was not made contingent upon Occidental's receiving 500,000 or any given number of shares, but committed Occidental to pur-

* Various intra-corporate reorganizations and changes of name (not relevant here) have subsequently been accomplished. To avoid confusion, only the names and relationships prevailing during the period at issue in these actions are given.

chase all shares tendered up to 500,000, with an option to purchase all or any part of shares tendered in excess of 500,000. Prior to announcement of the Occidental tender offer, Kern stock had been selling at around $60 per share, having closed at $63⅝ on Friday, May 5, 1967. A copy of Occidental's tender offer is annexed hereto as Exhibit "A". This offer appeared in some 50 publications throughout the country commencing May 9, 1967 (Ex. "A-2", Occidental Answers to *Abrams* Interrogatories).

13. At the time of the Occidental tender offer, Old Kern had some 4,328,000 shares of capital stock issued and outstanding. Consequently, the 500,000 shares which Occidental's offer committed it to purchase was an amount in excess of 10% of Old Kern's common stock. Old Kern's common stock was a non-exempted security registered pursuant to Section 12 of the Securities Exchange Act of 1934 (the "1934 Act") and listed for trading on the New York and Pacific Coast Stock Exchanges. Thus, it was a class of equity security falling within the terms of Section 16 of the 1934 Act.

14. By May 10, 1967, two days after its offer was first announced, more than 500,000 shares of Kern common stock had been tendered to Occidental. In addition, Occidental had also purchased 1,900 Kern shares on the New York Stock Exchange on April 24 and April 28, 1967 (Ex. "C" to Occidental's Ans. to *Abrams* Interrogatories).* As of

* The 1,900 shares of Kern which Occidental purchased on the New York Stock Exchange in April 1967 are not included in this motion, since Occidental would not have been a beneficial owner of 10% of Kern common stock at the time of such purchase. Under Section 16(b), beneficial owners of more than 10% of a class of security (unlike directors or officers) are not liable for profits realized by a purchase and sale where the beneficial owner "was not such both at the time of the purchase and sale . . . of the security involved".

Affidavit of David R. Hyde, Read in Support of Foregoing Motion

May 10, 1967, Kern had exactly 4,328,140 shares of stock issued and outstanding.

15. On May 11, 1967, Occidental announced an extension of its tender offer to cover an additional 500,000 shares, again reserving the right to purchase all or part of any shares tendered in excess of the next 500,000 shares (Mar. 5, 1968 Aff. of Armand Hammer, in the *Mukamal* action, p. 8). Notice of such extension was published in various newspapers on May 15 and 16, 1967 (Ex. "B-2" to Occidental Ans. to *Abrams* Interrogatories). A copy of such notice is annexed hereto as Exhibit "B".

16. On May 18, 1967, recognizing that it had become a beneficial owner of more than 10% of a class of registered equity security and thus subject to the reporting requirements of Section 16(a) of the 1934 Act, Occidental filed an SEC Form 3—"Initial Statement of Beneficial Ownership of Securities"—pursuant to Section 16(a), stating that it had become the owner of 507,055 shares of Kern stock as of May 10, 1967. Again, on June 9, 1967, Occidental filed a Form 4 for May 1967 pursuant to Section 16(a)—"Statement of Changes in Beneficial Ownership of Securities"—reporting purchases of an additional 376,326 shares and stating that by the end of May 1967 it owned 883,381 shares of Kern common stock. On June 30, 1967, Occidental filed a Form 4 for the month of June indicating that it owned 886,773 shares of Kern by the end of that month. On September 24, 1967, it filed an amended Form 4 for the month of June setting forth its ownership as of the end of June at 887,549 shares. Copies of these forms filed by Occidental are annexed hereto as Exhibits "C-1" through "C-4". Deducting the 1,900 Kern shares Occidental purchased on the New York Stock Exchange in April 1967, leaves a total of 885,649 shares of Kern common stock purchased by Occidental pursuant to its tender offer.

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17. The pre-trial discovery has not elicited the exact dates when Occidental made payment for the various shares tendered, but this fact is, we submit, not material since no tendered shares could have been purchased prior to May 8, 1967—a date well within six months of any possible sales date. Furthermore, in determining when a "purchase" occurs, the authorities (as shown in the accompanying memorandum) look to the date when the purchaser "incurred an irrevocable liability to take and pay for the stock", rather than the date when payment was made. Here, by publicly announcing its tender offer on May 8, 1967, Occidental bound itself to take and pay for up to 500,000 Kern shares and must be deemed, for Section 16(b) purposes, to have purchased that number of shares on such date. The May 11, 1967 extension of the offer committed Occidental to purchase any additional shares tendered up to 1,000,000 and Occidental must be deemed to have purchased its additional 385,649 Kern shares on that date.

THE TENNECO OFFER

18. Following announcement of Occidental's tender offer, the management of Old Kern entered into discussions with various companies, including both Tenneco and Occidental, with a view to a possible corporate combination with Kern. These efforts, the offers which were made, and the action taken by Old Kern are described in detail in the affidavit of George G. Montgomery, Chairman of the Board of Old Kern, sworn to March 11, 1968 and submitted to the Court on the prior motion for summary judgment made by plaintiff Mukamal.

19. On May 19, 1967, the Board of Directors of Old Kern approved an offer by Tenneco under which Tenneco

offered Kern, for each share of Kern stock outstanding, one share of a new $5.50 cumulative convertible preference stock of Tenneco in exchange for all of Kern's assets, property and goodwill (subject to Kern's liabilities). Kern's acceptance of the Tenneco offer was announced the same day. In a "Progress Report" for the first quarter of 1967, dated May 19, 1967, Dr. Armand Hammer, President of Occidental, stated:

> "As this is being written, we have been informed that the directors of Kern County Land Company have accepted an offer from Tenneco, Inc. to acquire all of Kern County's outstanding capital stock on an exchange basis which is estimated to be equivalent to $105 per share. Based on the approximately 900,000 shares which Occidental has purchased, this would indicate *a profit to your company of about $18 million,* or about $1.50 per share of Occidental stock presently outstanding." (Emphasis added)

20. Following announcement of the Tenneco offer, a detailed Agreement and Plan of Reorganization, dated as of June 1, 1967, between Teneco, Old Kern and New Kern (a newly organized Delaware corporation formed by Tenneco to receive the business and assets of Old Kern) was prepared. That Agreement, a copy of which is annexed hereto as Exhibit "D", provided, in pertinent part:

> "7.1 Except for the sum of money to be reserved by [Old] Kern for winding up its affairs and distributing the shares of Tenneco $5.50 Cumulative Convertible Preference Stock to the shareholders of Kern, Kern hereby agrees to convey, transfer, assign and deliver to KCL [New Kern] and KCL agrees to acquire and accept from Kern, as herein provided, on the Closing Date all of the assets and

properties, business and goodwill of Kern of every kind and description, whether or not described in Article I of this Agreement and Plan of Reorganization or any schedule therein referred to or any schedule delivered in substitution for any thereof, including without limitation all properties, tangible or intangible, real, personal or mixed, accounts receivable, bank accounts, choses in action, claims, cash and all securities, including Kern's stock ownership in all of its Subsidiaries (whether standing in the name of Kern or a nominee) but excluding shares of Kern capital stock held in Kern's treasury, claims and rights under contracts of Kern, right to use the name 'Kern County Land Company' and the copyrights, symbols and slogans incident to such name and all other names and all trade names, trademarks and slogans used by it in connection with its business or products and all books and records of Kern relative to its business, all as the same shall exist at the Closing Date.

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"7.4 On the terms and subject to the conditions herein set forth, Tenneco will cause KCL to deliver, and KCL will deliver, to Kern on the Closing Date definitive stock certificates for an aggregate number of shares of $5.50 Cumulative Convertible Preference Stock of Tenneco equal to the aggregate number of shares of capital stock of Kern which shall be issued and outstanding on the Closing Date. Such Tenneco stock certificates shall be registered in such names and shall represent such respective numbers of shares as Kern shall specify in writing to Tenneco. Promptly after receipt by Kern of the Tenneco stock certificates, it shall distribute or

caused to be distributed by its exchange agent all of the shares represented by such certificates to the holders of its capital stock in complete winding up and liquidation of Kern and will not otherwise dispose of any of such shares. Delivery of such shares shall be made against surrender by the shareholders of Kern of their respective Kern stock certificates on a share-for-share basis for each issued and outstanding share of Kern, exclusive of any shares held by Kern in its treasury, which shares shall be cancelled by Kern at or immediately after the Closing Date. Such distribution shall be effected by Wells Fargo Bank, San Francisco, California, to which Kern shall deliver the certificates of shares of Tenneco's $5.50 Cumulative Convertible Preference Stock received by Kern at the Closing Date with irrevocable instructions with reference to the distribution thereof, which instructions shall have Tenneco's approval.

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"7.7 At Closing Date (upon request of Tenneco) Kern shall amend its Articles of Incorporation so as to change its name to '600 California Corporation', and KCL may thereupon change its name, by amendment of its Certificate of Incorporation, to 'Kern County Land Company'.

"7.8 As soon as practicable after the closing Date, Kern in its new name will take such steps as may be required under the laws of the State of California to dissolve and terminate its corporate existence, except to the extent that under such laws its corporate existence may continue for the purpose of settling and winding up its affairs and shall take all action in addition to the action specifically

referred to above that may be necessary or appropriate in order to distribute to its shareholders certificates for shares of the $5.50 Cumulative Convertible Preference Stock of Tenneco pursuant hereto".

21. The foregoing Agreement and Plan of Reorganization was submitted to and approved by Old Kern's stockholders on July 17, 1967. Occidental, which by then owned 20% of Kern's outstanding common stock did not vote on the proposal but submitted a letter, which was read at the stockholders' meeting, explaining its position. A copy of that letter, and a subsequent letter correcting an error in it, are annexed hereto as Exhibit "E".

THE TENNECO-OCCIDENTAL OPTION AGREEMENT

22. Prior thereto, on June 2, 1967, Occidental entered into an option agreement with Tenneco Corporation, which, as previously noted, is a subsidiary of Tenneco. Under that agreement, Occidental granted Tenneco Corporation an option to purchase, when and if issued, all of the shares of Tenneco convertible preference stock which Occidental would receive with respect to 886,623 shares of Old Kern common stock at a price of $105 per share.* The option was exercisable after December 9, 1967. In return for the option, Tenneco Corporation paid Occidental $10 per share, or a total of $8,866,230, to be credited against the aggregate purchase price of $93,095,415 if the option were exercised. Occidental was also to receive third and fourth

* The number of Kern shares covered by the option was based upon the number of shares Occidental had, or believed it had, as of June 2, 1967, and is 926 shares less than the 887,549 shares Occidental ultimately acquired.

quarter 1967 dividends with respect to the Old Kern stock owned by it and the Tenneco Preference Stock which was the subject of the option. If the closing of the Tenneco-Kern agreement did not take place prior to July 31, 1968, the option terminated and the money paid to Occidental was to be repaid by it. A copy of the June 2, 1967 option agreement is annexed hereto as Exhibit "F".

23. The circumstances surrounding the giving of the above option have been a subject of factual dispute among the parties. However this may bear upon non-16(b) causes of action alleged in the stockholder actions, we submit that it has no relevance to Section 16(b) liability. The option agreement is admitted and speaks for itself.

THE CLOSING OF THE TENNECO-KERN AGREEMENT

24. On August 30, 1967, the closing of the Tenneco-Kern agreement was held. Old Kern received shares of Tenneco $5.50 Cumulative Convertible Preference Stock ("Tenneco Preference Stock") and all of the assets and business of Old Kern were transferred to Tenneco's subsidiary, New Kern, then known as KCL Corporation and which assumed the name "Kern County Land Company" after the closing. Old Kern's name was changed to "600 California Corporation", and an election to wind up and dissolve was filed by Old Kern with the California Secretary of State. On the same day, certificates representing the shares of Tenneco Preference Stock received by Old Kern were deposited with Wells Fargo Bank, San Francisco, as Exchange Agent, with instructions for distribution of such shares to Old Kern shareholders upon receipt of their Old Kern stock certificates for cancellation and retirement. Old Kern was thereafter formally dissolved on

October 6, 1967 by the filing of a Certificate of Dissolution with the California Secretary of State. Registration of Old Kern's capital stock, pursuant to Section 12 of the Securities Exchange Act of 1934, and the listing of these shares on the New York and Pacific Coast Stock Exchanges continued, however, until the opening of business on October 13, 1967 and October 16, 1967, respectivley. Trading of the shares had, however, been suspended on both exchanges prior to the opening of business on September 25, 1967.

25. Among the Old Kern assets transferred to New Kern at the closing on August 30, 1967 was a specific assignment of "all claims, demands, rights and choses in action accrued to or to accrue to" Old Kern under the Securities Exchange Act of 1934 and the rules promulgated thereunder. A copy of this assignment is annexed hereto as Exhibit "G".

26. The option agreement between Occidental and Tenneco Corporation dated June 2, 1967, described above, was sold, as permitted by its terms, to the investment banking firm of Loeb, Rhoades & Co. on August 16, 1967 and was thereafter assigned by Loeb, Rhoades to the LR Fixed Investment Trust.

27. On December 11, 1967, a closing was held under the option agreement in Nassau, Bahamas. At that time, Occidental exchanged certificates representing 886,623 shares of Old Kern capital stock for a certificate representing a like number of shares of Tenneco Preference Stock (not having availed itself previously of its right to exchange these shares), which certificate it then endorsed over to the LR Fixed Investment Trust. In return, $84,229,185 was credited to Occidental's accounts at various banks. With this amount, plus the $8,886,230 received in June, Occidental received $93,095,415 for its Old Kern stock.

28. In addition to the above, on or about September 21, 1967, Occidental received a dividend from New Kern in the amount of $576,744.35 on its Old Kern stock (Occidental Ans. to *Abrams* Interrogatories, p. 7).* This dividend had been declared by Old Kern's Board at a meeting held on August 3, 1967 payable to stockholders of record on August 14, 1967. At the same meeting Old Kern's Board authorized an agreement between Old Kern and Tenneco (dated August 4, 1967) which provided that if the closing occurred prior to September 21, 1967, the date set by Old Kern's Board for payment of the dividend, New Kern would make payment of the dividend.** In addition, on or about January 9, 1968, Occidental received a further dividend, this one payable to it on the Tenneco Preference Stock, in the amount of $1,220,379.88, or $1.375 per share on 887,549 shares. This dividend was payable to holders of record on November 24, 1967.

THE 16(b) CAUSES OF ACTION

29. In summary, there are essentially two different and alternative 16(b) causes of action asserted against Occi-

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* This dividend was at the rate of 65¢ per share and was apparently paid on 887,549 shares, 250 shares less than the number Occidental ultimately owned.

** Section 5.1(i) of the Tenneco-Kern agreement had provided that Old Kern would not prior to the closing declare any dividend other than its regular quarterly dividend of 65¢ per share. Because of the uncertainty as to when the closing would occur, the August 4, 1967 dividend adjustment agreement provided for payment of the regular Kern third quarter dividend by either Old Kern or New Kern depending upon whether the closing occurred prior to the payment date. It further provided that the dividend on the Tenneco Preference Stock would accrue from September 30, 1967, if the closing occurred prior to December 31, 1967, rather than from the date of its issuance, as provided in the Tenneco-Kern agreement.

dental. In each the "purchase" is the same—Occidental's acquisition of Old Kern shares pursuant to its tender offer. However, one 16(b) cause of action asserts that the "sale" of these shares occurred on June 2, 1967 * when Occidental gave Tenneco Corporation an option on shares of Tenneco Preference Stock in return for $8,866,230,** that amount being in effect a down payment. The other 16(b) cause of action asserts in the alternative that if there were no sale by reason of the June 2, 1967 agreement, a "sale" occurred in any event on August 30, 1967 at the time of the Tenneco-Kern closing when Old Kern stockholders (including Occidental) became beneficially entitled to shares of Tenneco Preference Stock, which stock Occidental itself asserted was worth $18,000,000 more to it than it had paid for its Old Kern common stock.

30. A further question is presented in each of the above 16(b) causes of action as to what portion of the shares purchased by Occidental under its tender offer are encompassed by Section 16(b). There are two possibilities: (a) the entire 885,649 shares so purchased, or (b) only the number of shares purchased by Occidental in excess of 10% of the number of Old Kern shares outstanding, taking into account the 1,900 shares purchased by Occidental prior to

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* It could be argued that the "sale" pursuant to the option agreement did not take place until the closing of the Tenneco-Kern agreement on August 30, 1967, since the option was on shares of Tenneco Preference Stock and their issuance was a condition precedent to the sale. If this view is adopted, once that condition was satisfied, a sale then took place. Whether the sale date is June 2, 1967 or August 30, 1967, it is well within the six-month period.

** Of this amount, Occidental received $886,623 by check on June 2, 1967 and $7,979,607 by advice of credit from The Chase Manhattan Bank on June 9, 1967 (Occidental Ans. to *Abrams* Interrogatories, p. 17).

its tender offer. Since Old Kern had 4,328,140 shares outstanding on May 10, 1967, 432,814 shares constituted 10% of those outstanding. Occidental acquired 454,735 shares over and above that number.

31. While the foregoing are only the 16(b) issues now presented, it is important to note the existence of a third potential 16(b) liability, which did not ultimately materialize, but which did loom on Occidental's horizon in 1967. Awareness of this potential 16(b) liability is necessary to discussion of certain documents written at that time and understandings reached.

32. The Occidental-Tenneco Corporation option agreement executed on June 2, 1967 (Exhibit "F" hereto) bound Occidental to sell if the option were exercised 886,623 shares of Tenneco Preference Stock which it would receive as an Old Kern shareholder. The option was exercisable at any time after December 9, 1967 and had to be exercised by December 31, 1967 if the Tenneco-Kern agreement were closed by December 10, 1967, or within thirty days if the closing occurred at a later date. Thus, since the closing could not occur until July 17, 1967 (the date of the Old Kern stockholders' meeting) at the earliest, the option agreement was written in terms that meant that it would be exercised, if at all, at a date which would necessarily be less than six months after the date of the closing of the Tenneco-Kern agreement. Consequently, Occidental would be involved in a further "short-swing" transaction, this one with respect to Tenneco Preference Stock rather than Old Kern common stock.

33. The foregoing would come about because at the closing of the Tenneco-Kern agreement Occidental would become entitled to receive at least 886,623 shares (approx-

imately 20%) of Tenneco Preference Stock—a "purchase" of the Tenneco Preference Stock under Section 16(b), as construed. Upon the exercise of the option, Occidental would be obligated to sell that same stock on a date which, as pointed out, would be less than six months from the date of purchase.

34. However, Section 16 is applicable by its terms only to an equity security "which is registered pursuant to section 78e [Section 12 of the 1934 Act]". Under the terms of Section 12 of the 1934 Act, the Tenneco Preference Stock had to be registered under that section before it could be traded on a national securities exchange, *i.e.*, become a "listed" security. If it were not listed for trading on a national securities exchange, however, it did not have to be registered under Section 12 until 120 days after the end of the current fiscal year.* Since Tenneco's fiscal year ended on December 31st, this meant that Tenneco had until April 29, 1968 to register the Preference Stock under Section 12 of the 1934 Act.

35. Accordingly, if Tenneco were not to register its new Preference Stock (and consequently delay its listing on the stock exchanges) until after the Occidental option was exercised, Occidental's short-swing transaction in Tenneco Preference Stock would be accomplished during a time when that stock was not registered under Section 12 of the 1934 Act, taking Occidental's purchase and sale outside the scope of Section 16.

36. In actual fact, the Tenneco Preference Stock was not registered until December 28, 1967, subsequent to the

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* Registration within such period was mandatory under Section 12(g) of the Act because Tenneco was a company having more than $1,000,000 in assets and there would be more than 500 holders of the Tenneco Preference Stock.

exercise of the Occidental option on December 11, 1967. Thus, Occidental's potential liability for a "short-swing" transaction in Tenneco Preference Stock never materialized. However, such a potential liability was in the minds of Occidental and its attorneys prior to the exercise of the option and many of the references to 16(b) liability and to "registration" and "listing" in the contemporaneous documents and conversations (discussed below in connection with Occidental's affirmative defenses) refer to this potential liability which did not materialize, rather than to the 16(b) liability which did—that arising from Occidental's "short-swing" transactions in Old Kern common stock.

THE NEW KERN COMPLAINT

37. New Kern's amended and supplemental complaint in 67 Civ. 4042, Action No. 3, was filed February 29, 1968. It is in four counts, each alleging a separate 16(b) liability.

Count One

38. Count One is based upon the June 2, 1967 option agreement between Tenneco Corporation and Occidental and alleges that that agreement constituted a sale of 886,623 shares of Old Kern stock. It further alleges that Occidental's acquisition of "more than 887,000 shares of stock" pursuant to its tender offer "constituted a purchase of said securities at a time when defendant was the beneficial owner of more than 10 per centum of said securities."

39. New Kern presently contends that Occidental made, within the meaning and interpretation of Section 16(b), two purchases of Old Kern stock pursuant to its tender offer.

The first purchase was of 500,000 shares and occurred on May 8, 1967 when Occidental legally committed itself to accept and pay for 500,000 shares of Old Kern common stock. This was a purchase of more than 10 per centum of Old Kern's outstanding common stock. The second purchase occurred on May 11, 1967 when Occidental committed itself to take an additional 500,000 shares of Old Kern. Since an additional 385,649 shares were actually tendered to Occidental pursuant to the May 11, 1967 increase in its offer, Occidental, as a matter of Section 16(b) interpretation, purchased 385,649 shares that day. New Kern contends, for reasons set forth in the accompanying memorandum of law, that both purchases, in their entirety, fall within the coverage of Section 16(b).

40. New Kern further contends, as previously noted, that the option agreement entered into on June 2, 1967—less than six months after the May 8 and May 11 purchases—constitutes a sale of 886,623 shares of Old Kern stock. However, since the number of shares Occidental purchased pursuant to its tender offer was only 885,649 (1,900 additional shares having been purchased on the exchange in April 1967), it is the profit on that number of shares—885,649—for which Occidental should be required to account.

41. If the Court finds Occidental liable for such profits, the amount thereof is readily ascertainable. Since Occidental paid $85 per share of Old Kern ($83.50 to the tenderer plus $1.50 commission to brokers) * and received

* It is possible that some shares were tendered directly, without going through a broker, in which case, Occidental's profit would be $21.50 per share. However, such tendering is rare and the amount of additional profit would probably be de minimis. Accordingly, New Kern accepts, for purposes of this motion, that Occidental paid $85.00 for each share tendered to it.

$105 per share under the June 2, 1967 option agreement, a profit of $20 per share, or total of $17,712,980, was made. In addition, there must be added to and included in such profit the dividends on such shares received by Occidental. The option agreement expressly contemplated Occidental's receipt of dividends for the third and fourth quarters of 1967 on the Old Kern common and on the Tenneco Preference Stock. At 65¢ per share on Old Kern common, this comes to $575,671.85 for the third quarter dividend and at $1.375 per share on the Tenneco Preference Stock to $1,219,106.62 for the fourth quarter dividend, for a total profit to Occidental under the option agreement of $19,507,758.47. Finally, New Kern asks the Court to award interest as it has the power to do in a Section 16(b) case.

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42. If the Court does not agree with New Kern's position that Occidental made two purchases of Old Kern stock pursuant to its tender offer, but instead believes that Occidental made a series of separate purchases of Old Kern stock, then New Kern's second cause of action is urged. If the Court does not agree with New Kern's position that the option agreement constituted a sale of Occidental's shares of Old Kern common stock, then New Kern's third cause of action (which alleges that a sale occurred upon consummation of the Tenneco-Kern transaction) is urged. If the Court does not agree with a New Kern's position on either the purchase or the sale aspects embodied in the first cause of action, then New Kern's fourth cause of action is urged. This fourth cause of action combines the purchase alleged in the second cause of action with the sale alleged in the third cause of action.

Affidavit of David R. Hyde, Read in Support of Foregoing Motion

Count Two

43. Count Two of New Kern's amended and supplemental complaint is identical to Count One insofar as the sale aspect of the 16(b) transaction is concerned, *i.e.*, the option agreement constituting a sale of Old Kern common stock.

44. Count Two differs from Count One in that it alleges that Occidental by some purchase of Old Kern shares on or before May 10, 1967 became the owner of more than 10 per centum of those outstanding (thereby breaking down Occidental's acceptances of tendered shares into separate purchases), and that Occidental is accountable under Section 16(b) for profit realized on those shares acquired in the purchase by which it became a 10% owner* and on all shares acquired thereafter.

45. New Kern does not have information as to the particular acceptance of tender by which Occidental became a 10% owner of Old Kern common stock but this information would seem readily available from business records and could probably be stipulated to by the parties should the Court adopt the rationale embodied in this claim for relief. Assuming, however, that Occidental had 432,813 shares (one less than 10%) at a given time and is

* As demonstrated in the memorandum of law, a beneficial owner of 10% of outstanding shares is accountable for short-swing profits on the sale of shares, the purchase of which put him over the 10% figure. Thus, if Occidental accepted a tender of 10,000 shares at a time when it had previously accepted 425,000 shares, this purchase would have made it a 10% holder of Kern stock, there being 4,328,140 shares outstanding. Under the governing authority, Occidental would be accountable for profit realized on the entire 10,000 shares, rather than on the 2,186 shares in excess of 10% which it would own following its purchase of the 10,000 shares.

accountable only on those acquired thereafter (454,736—arrived at by deducting 432,813 from 887,549, the total number of shares acquired by Occidental), the short-swing profit at $20 per share would come to $9,094,720 plus $920,840.40 in dividends (454,736 shares at 65¢ per share on Old Kern common for one quarter plus $1.375 on Tenneco Preference Stock for one quarter) or a total of $10,015,560.40, plus interest. This would be the minimum amount for which Occidental would be accountable under Count Two.

Count Three

46. Count Three of New Kern's amended and supplemental complaint is identical to Count One insofar as the purchase aspect of the transaction is concerned, alleging that Occidental's profit on the entire number of Old Kern shares acquired pursuant to the Occidental tender offer should be accounted for. New Kern's present position on the purchase aspect of Count Three is identical to the position it takes in Count One.

47. Count Three differs from Count One with respect to the sale aspect of the 16(b) transaction, alleging that the receipt by Old Kern of shares of Tenneco Preference Stock and the deposit thereof with the Exchange Agent with instructions for distribution of such shares to Old Kern shareholders on a one-for-one basis upon receipt of their Old Kern stock certificates for cancellation and retirement, i.e., the closing of the Tenneco-Kern transaction, constituted a sale of Occidental's shares of Old Kern within the meaning of Section 16(b). Of course, if the Court finds that the June 2, 1967 option agreement constituted a sale of Occidental's holdings of Old Kern stock,

the legal effect of the subsequent closing on August 30, 1967 need not be considered, since Occidental, having sold the stock on June 2, would not have been a beneficial owner of it on August 30. If, however, the Court finds that the June 2 option agreement was not a sale, then Occidental was a beneficial owner of Old Kern stock on August 30, 1967 and the legal effect of the closing must be considered. New Kern contends that the closing gave rise, as a matter of law, to a sale of Old Kern stock by all those who owned such stock on August 30, 1967.

48. In connection with New Kern's position that the closing gave rise to a sale of Old Kern stock, the following exhibits are annexed hereto:

(a) Exhibit "H", a copy of the instructions given by Old Kern to the Wells Fargo Bank as Exchange Agent with respect to distribution of the Tenneco Preference Stock.

(b) Exhibit "I", a copy of Old Kern's election to wind up and dissolve filed with the California Secretary of State on August 30, 1967.

(c) Exhibit "J", a copy of the letter sent by Old Kern to its shareholders dated August 31, 1967, advising of the transfer of its assets.

(d) Exhibit "K", a copy of Old Kern's Certificate of Dissolution filed with the California Secretary of State on October 6, 1967.

(e) Exhibit "L", a letter of transmittal dated December 11, 1967 from Occidental to Wells Fargo Bank transmitting certificates for 887,549 shares of Old Kern common stock.

(f) Exhibit "M", receipt delivered to Wells Fargo Bank by Occidental on December 11, 1967 acknowledging receipt of certificates representing 887,549 shares of Tenneco Preference Stock (*cf.*, Deposition of Dorman E. Commons, pp. 103-04).

49. New Kern submits that the foregoing documents, along with the basic June 1, 1967 Agreement and Plan of Reorganization (Exhibit "D" hereto), establish that, as a matter of law, a sale of Old Kern common stock occurred on August 30, 1967 when the closing of the Agreement occurred. That date is well within six months of the earliest possible date on which Occidental acquired any tendered Kern stock—May 8, 1967. Even the formal dissolution of Old Kern on October 6, 1967 is within six months of such date.

50. Certainly, December 11, 1967, when Occidental finally surrendered stock certificates of Old Kern "[p]ursuant to the letter of Kern County Land Company ('Kern') dated August 31, 1967 advising of the transfer of its assets to a wholly owned subsidiary of Tenneco Inc." (see Exhibit "K" hereto), must be disregarded as a date of any relevance. As Occidental acknowledged in its letter of transmittal to Wells Fargo Bank, it surrendered its Old Kern certificates pursuant to Old Kern's letter of August 31, 1967, an act which it could have performed at any time commencing August 31, 1967. To look to a date when certificates—which had no economic value other than to be exchanged for shares of stock in another company which did have such value—were physically exchanged would be to look solely to form without regard to substance. The substance of the matter is that as from August 30, 1967 Old Kern shareholders became beneficial owners of a new class of Tenneco Preference Stock.

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51. If the Court adopts the theory of liability embodied in Count Three, the damages should, we submit, be the same as those under Count One and set forth in Paragraph 41 above. This purchase price is the same, $85 per share. In fixing the sales price for Old Kern common stock, the Court would have to look to the value of the Tenneco Preference Stock received in return. As previously noted, Occidental's President, Dr. Armand Hammer, in a report to Occidental's stockholders put a value of $105 per share on the Tenneco shares, a figure which was supplied by a partner in Occidental's investment bankers, Lehman Brothers (Hellman Dep., p. 89). This figure gives a profit of $20 per share, the same profit realized under the June 2, 1967 option agreement.*

Count Four

52. Count Four of New Kern's amended and supplemental complaint is identical to Count Three insofar as the sale aspect of the transaction is concerned, alleging that a sale occurred by reason of the closing of the Tenneco-Kern transaction. It differs from Count Three in that it adopts the purchase theory of Count Two, breaking down Occidental's acquisition of tendered shares into separate purchases and asserting 16(b) liability only with respect to that acceptance of shares by which Occidental became the owner of more than 10% of Old Kern's stock and later acceptances of shares.

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* If the Court declines to accept the $105 per share figure as the value of the Tenneco Preference Stock, a hearing or reference would probably be needed to determine the value of that stock and, consequently, the profit made by Occidental. It is in this connection that New Kern alternatively moves for partial summary judgment.

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53. Damages under Count Four would be arrived at in the manner described in Paragraphs 44 and 45 insofar as the number of shares to be accounted for is concerned and, for the reasons set forth in Paragraph 51, would be no less than the minimum damages computed in Paragraph 45, the actual amount being readily ascertainable and the subject of a probable stipulation by the parties.

OCCIDENTAL'S ANSWER

54. In its amended answer and counterclaim ("answer") to New Kern's amended and supplemental complaint, Occidental formally denies a major portion of the allegations of that complaint. However, it seems clear from what has transpired in the litigation thus far and the discovery proceedings undertaken that Occidental does not contest any of the underlying facts, but simply the characterization of certain incidents as being either a purchase or sale of securities.

55. Thus, it would seem that the only material issues in dispute are (a) whether Occidental's acquisition of Old Kern's shares occurred by two separate purchases on May 8 and May 11, 1967 (as New Kern contends in the first instance) or by a series of separate purchases (as Occidental claims,* and as New Kern alleges as an alternative position if the Court rejects its primary position), and (b) when the sale of Occidental's Old Kern shares took place: at the time of execution of the option agreement on June 2, 1967 (as New Kern contends in the first instance); on August 30, 1967 at the closing of the Tenneco-Kern transaction (as New Kern alleges alternatively); or (as Occi-

* See Occidental's answer to New Kern's amended and supplemental complaint, ¶ 6.

dental apparently contends) on December 11, 1967 when Occidental exchanged its Old Kern certificates for certificates of Tenneco Preference Stock and delivered those certificates to the LR Fixed Investment Trust in return for the balance of the $93,095,415 owing to it.

56. We submit that the above issues are solely issues of law which the Court is in a position to determine from the undisputed material facts underlying the transactions in issue here. New Kern's position with respect to these matters is supported in the accompanying memorandum of law.

OCCIDENTAL'S AFFIRMATIVE DEFENSES

57. Apart from taking issue with New Kern's position as to its purchases and sale of Old Kern stock, Occidental has pleaded in its answer some seven affirmative defenses against one or more of the counts alleged in New Kern's amended and supplemental complaint.

Occidental's First Defense (To All Counts)

58. Occidental's first affirmative defense consists of the bare allegation that the complaint "fails to set forth any claim upon which relief can be granted against defendant". New Kern submits that its complaint clearly states claims for relief under Section 16(b) and that this defense should be stricken.

Occidental's Second Defense (To Counts III and IV)

59. For a second affirmative defense, applicable only to Counts III and IV of the amended and supplemental com-

plaint (those alleging that the closing of the Tenneco-Kern transaction constituted a sale of Kern stock), Occidental alleges that on August 21, 1967, the District Court of Knox County, Texas (a small county in West Texas which Judge Leo Brewster of the United States District Court for the Northern District of Texas aptly described as "Marlboro Country", 283 F. Supp. at 885) entered an injunctive order against the consummation of the Tenneco-Kern transaction; that on August 28, 1967 the Court continued that restraining order in effect until September 2, 1967; and that on August 30, 1967 Old Kern and Tenneco wilfully closed their agreement in violation of the foregoing injunctive order. As a result thereof, Occidental alleges that Tenneco is barred from seeking relief "because of the well settled doctrine which precludes any person from predicating a claim upon his own wrong".

60. The facts with respect to the Knox County action are discussed at length in the reply affidavit of Charles S. Taylor, Jr., Vice President and Associate General Counsel of Tenneco Inc., sworn to March 6, 1968, filed with this Court in connection with the *Mukamal* motion for summary judgment. They are also discussed at length in the opinion of Judge Brewster granting a preliminary injunction in *600 California Corporation* v. *Harjean Co.*, 284 F. Supp. 843 (N.D. Tex. 1968).

61. As Mr. Taylor's affidavit and Judge Brewster's opinion show, the charge of contemptuous conduct on the part of Tenneco and New Kern is completely without foundation. Moreover, Occidental's asserted defense appears to be nothing more than an attempt to invoke the doctrine of estoppel or unclean hands in a Section 16(b) action. As our accompanying memorandum shows, these

defenses have been consistently rejected by the courts. Accordingly, we respectfully submit that Occidental's second affirmative defense should be stricken as unfounded in fact and insufficient in law.

Occidental's Third Defense (To Counts III and IV)

62. Occidental's third affirmative defense, pleaded against Counts III and IV of New Kern's supplemental and amended complaint, is also based on the Knox County, Texas proceedings. It alleges that on September 2, 1967, the District Court of Knox County ordered Tenneco to show cause why it should not be punished for contempt. The defense alleges that if the defendants are found guilty of contempt, the Court has the power "to direct plaintiff [New Kern] and said defendants [Tenneco and Old Kern] to purge themselves of said contempt by undoing the act they did in violation of the Court's restraining order" and that, consequently, "plaintiff's claims for relief under the third and fourth counts is premature and will continue to be premature until such time as the aforesaid order to show cause is finally disposed of and concluded".

63. Apart from the legal insufficiency of these defenses, the fact is that the Knox County proceeding has been finally concluded without any adjudication of contempt or order setting aside the consummation of the Tenneco-Kern transaction.

64. On September 14, 1968, a final order of dismissal was entered in the Knox County proceeding. A copy of a certified copy of said order is annexed hereto as Exhibit "N".

65. Furthermore, on July 24, 1969, Judge Brewster entered an order of permanent injunction in *600 California*

Corporation v. *Harjean Co., supra,* which among other things enjoins defendants and all other shareholders of Old Kern from taking any action or instituting any proceedings designed to rescind the closing and consummation of the Tenneco-Kern transaction, to have it set aside or declared void, or to bring about any return to the pre-existing status quo. A copy of Judge Brewster's order is annexed hereto as Exhibit "O".

66. From the above, it is clear that the Tenneco-Kern transaction is not going to be "undone" and that Counts III and IV are not "premature" as alleged in Occidental's Third Affirmative Defense. Accordingly, New Kern respectfully submits that that defense should be dismissed as unfounded on the facts and insufficient in law.

Occidental's Fourth Defense (to Counts III and IV)

67. Occidental's fourth amended defense, which is also limited to Counts III and IV of New Kern's amended and supplemental complaint, alleges an agreement not to close the Tenneco-Kern transaction. It alleges that in consideration of Occidental's agreement to dismiss certain proceedings instituted by it in California and its agreement to grant Tenneco Corporation an option it was agreed that the closing of the Tenneco-Kern transaction "would not occur prior to December 9, 1967, in the absence of any favorable ruling from the Securities and Exchange Commission exempting Occidental from liability under Section 16(b) of the Securities Exchange Act of 1934 by reason of its acquisition of Old Kern's stock by public offering within six months prior to the closing of the aforesaid transaction". Occidental's fourth defense further alleges that New Kern, Old Kern and Tenneco breached the aforesaid

agreement by closing their transaction on August 30, 1967 "notwithstanding the absence of the favorable ruling from the Securities and Exchange Commission" and that plaintiff is "estopped" from stating any claim for relief under Counts III and IV.

68. Although New Kern submits that such an estoppel defense is totally insufficient in law under the applicable authorities construing Section 16(b), it also feels that the Court should have the full factual background with respect to Occidental's alleged defense. The actual facts are as follows:

Occidental's Efforts to Secure An SEC Ruling

69. Occidental, having acquired over 800,000 shares of Old Kern common stock pursuant to its tender offer in May 1967, became faced with a potential 16(b) liability immediately upon the May 19, 1967 announcement of the proposed Tenneco-Kern agreement. This potential liability was based upon the possibility that the closing of the Tenneco-Kern agreement would occur within less than six months and that it would be held to be a sale of Old Kern stock within the meaning of Section 16(b). Such potential liability existed separate and apart from any distinct grounds for 16(b) liability which might arise should Occidental attempt to dispose of its stock, through option or otherwise, prior to the closing.

70. Thus, by letter dated August 15. 1967, Occidental's New York counsel, Messrs. Phillips, Nizer, Benjamin, Krim & Ballon, advised the New York Stock Exchange of Occidental's problems, stating:

> "The consummation of the reorganization between Tenneco and Kern and the exchange by share-

holders of Kern, including Occidental, of their shares of Kern capital stock for new Tenneco Preference Stock within a period of less than six months of the purchase by Occidental of the Kern shares might well bring this combination of transactions within Section 16(b) and, accordingly, might well oblige Occidental to pay over any and all profits deemed to have arisen from these transactions to Kern or its corporate successor, Tenneco Corporation. While this legal conclusion is subject to considerable doubt, applicable decisions rendered by the Federal courts in this area would indicate that *Occidental faces a very serious potential liability under Section 16(b) in this regard.*" (Emphasis added)

A copy of the aforesaid letter is annexed hereto as Exhibit "P".

71. Faced with the 16(b) problem which would confront Occidental upon the closing of the Tenneco-Kern transaction, Occidental turned, among other things, to the Securities and Exchange Commission for help. Occidental asked the SEC to adopt, pursuant to the rule-making authority conferred upon it by Section 16(b), a new Rule 16(b)-11. A copy of Occidental's original proposed Rule 16(b)-11, as sent to Tenneco's attorneys, Cahill, Gordon, Sonnett, Reindel & Ohl, by Occidental's San Francisco attorneys, Pillsbury, Madison & Sutro, by letter dated June 5, 1967, is annexed hereto as Exhibit "Q".

72. The option agreement between Tenneco Corporation and Occidental was negotiated on May 30, June 1 and June 2, 1967. At that time, Occidental believed that the Securities and Exchange Commission would adopt the exemptive rule which it had proposed. This is confirmed in

a letter written by Occidental's Los Angeles counsel, Gibson, Dunn & Crutcher, to the California Commissioner of Corporations on August 11, 1967, a copy of which is annexed hereto as Exhibit "R":

> "The Securities and Exchange Commission had long been studying an exemption from 16(b) for transactions like the Kern-Tenneco plan. *Legal counsel for Occidental,* after consultation with the Chairman and General Counsel of the Securities and Exchange Commission, *assurred Occidental that a rule establishing such exemption,* at least for those who became substantial owners of stock in a corporation by reason of a tender offer which was followed by a merger or similar transaction with another party, *would be promptly adopted.*" Emphasis added)

73. Despite the alleged assurances of Occidental's counsel, no rule was forthcoming. The letter of Occidental's counsel to the California Commission of Corporations goes on to state:

> "The proposed Securities and Exchange Commission rule holding that the closing of a transaction such as this would not constitute a 'sale' of the Kern stock held by Occidental has not yet been adopted, although *it was confidently expected much earlier.* The proposed rule was not a special one for this case, but one which would be of general application including this case. The SEC has long had such a rule under consideration but is anxious not to word it in such a way as might provide loopholes for the unscrupulous.
>
> "On July 12, 1967, the secretary of the SEC wrote to Washington counsel of Occidental advising

him that 'the Commission considers it undesirable to publish for comment any proposed rule in this area at the present time.' We are hopeful of changing this attitude and expected that we would have an opportunity to do so before the closing. When and if such a rule is obtained it will be of enormous benefit in many transactions and not just in the present one." (Emphasis added)

74. Occidental persisted in its efforts to obtain relief from the SEC. On August 29, 1967, the Commission heard Occidental in support of a modified version of its proposed rule. A copy of Occidental's proposed revised Rule 16(b)-11, which was the subject of a formal hearing before the Commission on August 29, 1967, is annexed hereto as Exhibit "S". Thereafter, on September 5, 1967, Occidental's attorneys filed a 30-page letter with the SEC in further support of its rule. A copy of this letter is annexed hereto as Exhibit "T". Nevertheless, the Commission refused to modify its earlier decision not to take action and to this day has not taken any such action.

Occidental's California State Court Actions

75. Immediately following announcement of the Tenneco-Kern agreement on Friday, May 19, 1967, Occidental, on the following Monday, May 22, 1967, made written demand upon Old Kern for an inspection of the list of its shareholders, books of account, minutes of stockholder, board of directors and executive committee meetings, together with all records, books and documents referred to therein. On Friday, May 25, 1967, Occidental filed a petition for a writ of mandate in the Superior Court of California for the City and County of San Francisco, demanding inspection of said documents. Accompanying said peti-

tion was an ex parte order (which was signed by the Court) granting Occidental leave to serve notices of deposition upon the President and Secretary of Old Kern and shortening the time for taking said depositions until seven days after the service of the notices.

76. Prior to the return date of the aforesaid writ of mandate, Occidental made a further written demand upon Old Kern calling for inspection of numerous additional books and records. This demand was followed by the filing of a second petition for writ of mandate on May 31, 1967. Copies of the various court papers, exhibits and written demands made are annexed to the affidavit of George G. Montgomery, sworn to March 11, 1968 and filed in the *Mukamal* action. Mr. Montgomery's affidavit also describes the various efforts made by Old Kern to comply with the Occidental demands.

The Alleged Agreement Not to Close

77. As noted, Occidental's fourth affirmative defense alleges an agreement not to close the Tenneco-Kern agreement prior to December 9, 1967 in the absence of a favorable exemptive ruling from the SEC "in consideration of defendant's agreement to dismiss the stockholder suits commenced by it against plaintiff's assignor, Old Kern, in the Superior Court of California for the City and County of San Francisco, and its agreement to grant Tenneco Corporation an option to purchase the new preference stock of Tenneco, Inc." It is clear that no such agreement ever existed. The Tenneco-Kern plan itself (Exhibit "D" hereto), of course, provided in Paragraph 7.9 that:

> "The closing under this Agreement and Plan of Reorganization shall take place at the offices of Kern,

600 California Street, San Francisco, California on such date not earlier than September 30, 1967 and not later than December 31, 1967 as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon."

78. Taking up the second aspect of the alleged agreement first, there can be no serious contention that the granting of the option agreement was in any way conditioned upon the date of closing. The June 2, 1967 option agreement (Exhibit "F") expressly provides that it "constitutes the entire agreement between the parties and may not be amended except in writing" (Para. 12). At no time during the extensive pre-trial discovery had herein, has Occidental identified who it claims made the alleged agreement not to close, nor when or where it was made. In its negotiations with respect to the option agreement, Occidental was represented by its Executive Vice President, Mr. Walter R. Davis. At his deposition, Mr. Davis was examined extensively about the discussions he had with Tenneco's representatives on May 30, June 1 and 2, 1967, the three days of meetings which preceded the execution of the option agreement on June 2, 1967. Mr. Davis testified as follows:

"Q. Do you recall whether there was any discussion at these three days of meetings about the closing date for the transfer of current assets to Tenneco? A. No. I mean I don't recall it, is what I am saying."

79. Confirming the above testimony is a letter which Mr. Albert J. Brown of the firm of Pillsbury, Madison & Sutro wrote to Mr. Arnold Daum of Cahill, Gordon, Sonnett, Reindel & Ohl on June 6, 1967, the Tuesday following

the execution of the option agreement. As pointed out in this letter (a copy of which is annexed hereto as Exhibit "U"), Occidental's attorneys (who acted for Occidental in drafting the option agreement) informed the Securities and Exchange Commission on June 5, 1967 that if the SEC did not adopt the rule proposed to it by Occidental, giving Occidental "some relief in the situation in which it found itself", then "the only alternative that Occidental had was to commence every kind of litigation it could reasonably bring and attempt to stall the consummation of the Tenneco-Kern transaction for six months". Obviously, if Tenneco had agreed as a consideration of the June 2, 1967 option agreement to defer the closing if necessary to accommodate Occidental, there would have been no occasion or necessity for Occidental to advise the SEC on June 5, 1967 that if it failed to act, Occidental would be forced to bring law suits to "attempt to stall the consummation of the Tenneco-Kern transaction for six months".

80. Mr. Davis' deposition provided further confirmation that Occidental's efforts to get Tenneco to delay the closing of the Tenneco-Kern transaction (thereby hopefully obviating any 16(b) liability) came long after the execution of the option agreement and bore no relation to it. Mr. Davis testified to a later meeting with Tenneco's Chairman, Mr. Gardiner Symonds, subsequent to their meetings leading up to the execution of the option agreement on June 2, 1967.* Mr. Davis testified as follows:

> "I related to him [Mr. Symonds] the suggestion by one of the attorneys that the closing date be post-

* Mr. Davis believed that the later meeting with Mr. Symonds occurred prior to July 17, 1967, the date of the Kern stockholder meeting approving the Tenneco-Kern transaction. Tenneco's records indicate that the meeting in fact took place on August 2, 1967.

poned and he said that was impossible, he felt that he would be liable to his stockholders if he did anything to postpone this matter or the closing date.

"I think that is the gist of all the conversations that I can recall.

"Excuse me. One other thing, he went into some detail about and said this before to me, that I was aware of how employees got upset when a merger was pending and how important it was to make the most as quickly as possible to keep the people satisfied and happy and so forth, that they would have a job and have some security in the future. He went over this again which from a business standpoint I agreed with him about that."

As noted, this testimony refers to a meeting long after the execution of the option agreement. Thus, it is obvious that Tenneco never agreed to defer the closing of the Tenneco-Kern agreement as a consideration of the June 2, 1967 option agreement, at which time Occidental thought it would receive a favorable exemptive ruling from the SEC. Occidental's efforts to get Tenneco to defer the closing came about after Occidental subsequently learned that the SEC had rejected its proposed rule.

81. Secondly, Occidental's fourth affirmative defense contends that Tenneco agreed to delay the closing for six months (absent a favorable SEC ruling) in consideration of Occidental's dismissal of its California mandamus proceedings. Again, the contemporaneous documentary evidence completely disproves such an agreement. As noted above, at the time of execution of the June 2, 1967 option agreement, there was a third potential 16(b) liability facing Occidental, *i.e.*, the possibility of a short-swing transaction

arising out of Occidental's acquisition of and disposition of the Tenneco Preference Stock which it would receive. Such liability, as noted, would only exist if the Tenneco Preference Stock were registered under Section 12 of the Securities Exchange Act prior to any exercise of the option.

82. What Occidental in fact did was to dismiss its California mandamus proceedings after it had received Tenneco's assurances that it would not list its Preference Stock until the exercise date of the option had passed. Attached hereto as Exhibit "V" is a letter from one of Occidental's attorneys, Bruce Alan Mann of the firm of Pillsbury, Madison & Sutro in San Francisco, to Richard J. Archer, Occidental's attorney of record in the mandamus proceedings, directing him to "take prompt steps to cause the various actions brought by Occidental Petroleum Corporation against Kern County Land Company to be dismissed". Mr. Mann's letter recites the assurances of Tenneco that its Preference Stock would not be listed until the option was exercised or expired and directs *"on the basis of the foregoing, that the mandamus actions be dismissed"* (emphasis added). Nothing is said with respect to the closing date.

83. Also annexed hereto as Exhibit "W", is a letter from Mr. Archer to Dr. Armand Hammer, President of Occidental, dated August 9, 1967, enclosing a copy of the foregoing June 16, 1967 letter. This, too, speaks only in terms of the agreement with respect to listing of the stock as encompassing "registration" and acknowledges that this "was *the basis* for our dismissing the law suits against Kern" (emphasis added). Again, nothing is said about any agreement to defer the date of the closing.

84. Next, by letter dated August 16, 1967 (Exhibit "P" hereto), Occidental's New York counsel, Phillips, Nizer,

Benjamin, Krim & Ballon, advised the New York Stock Exchange as follows:

> "We have been advised that, at the time the option was executed, Tenneco verbally agreed with Occidental that Tenneco would delay the listing of the new Tenneco Preferred Stock on the New York Stock Exchange until after the date upon which the option is either exercised or expires. Based upon *this contractual understanding,* Occidental agreed to dismiss voluntarily certain actions which Occidental had theretofore instituted against Kern." (Emphasis added)

Again, there is no reference to the dismissal of the California mandamus actions as being in any way conditioned upon the date of closing of the Tenneco-Kern transaction.

85. Finally, and perhaps the most persuasive of all, is the position taken by Occidental in certain litigation in Texas in August 1967. After other litigation had been commenced in Midland, Texas; Lincoln, Nebraska; San Francisco, California; and Knox County, Texas with respect to the Tenneco-Kern transaction, Old Kern, Tenneco and New Kern instituted an action for injunctive relief to prevent further interference with the closing in the District Court of Midland County, Texas on August 23, 1967 naming as defendants various stockholders of Old Kern including Occidental. On the same day, the Court issued a temporary restraining order which, among other things, enjoined Occidental "directly or indirectly from interfering in any manner with the closing and consummation of the [Tenneco-Kern] Agreement and Plan of Reorganization". A copy of said restraining order is annexed hereto as Exhibit "X". Occidental appeared by counsel at the hearing on plaintiffs' application for a preliminary injunc-

tion. At no time did Occidental ever make reference to any agreement not to close the Tenneco-Kern transaction until a six-month period had run out.

86. The foregoing makes it clear that there was never any agreement on Tenneco's part to alter the date of the closing of the Tenneco-Kern transaction to accommodate or obviate Occidental's 16(b) problems. Occidental's unsupported allegation in its pleading is obviously without foundation. Accordingly, Occidental's fourth affirmative defense, charging an alleged "estoppel", should be dismissed as unfounded in fact and insufficient in law.

Occidental's Fifth Defense (To Counts III and IV)

87. For a fifth affirmative defense, this one directed to Counts III and IV of New Kern's amended and supplemental complaint, Occidental appears to allege an implied agreement not to close the Tenneco-Kern transaction until after December 9, 1967. This affirmative defense recites the fact that the Old Kern proxy statement stated that the plan "would be consummated on a date to be agreed upon during the period from September 30 to December 31, 1967, and that the option granted by Occidental to a subsidiary of Tenneco to acquire 886,623 shares of Tenneco which Occidental would receive under the Plan would not be exercisable until December 9, 1967". Occidental further notes that the proxy material did not list the alleged claim against Occidental under 16(b) as an asset of either Old Kern or New Kern. Occidental then alleges that the foregoing "constituted a representation to Occidental and the other shareholders of Old Kern that the Plan would not be consummated until after December 9, 1967", that in reliance upon these representations "Occidental dismissed its two said stockholder actions" and that without such representa-

tions "Occidental would not have dismissed said stockholders' actions and said Plan would not have closed prior to December 9, 1967".

88. The foregoing allegations are utterly lacking in logic as well as merit. How a statement in the proxy material that the plan would be consummated on a date "from September 30 to December 31, 1967" can constitute "a representation to Occidental and the other shareholders of Old Kern that the Plan would not be consummated until after December 9, 1967", as Occidental alleges is nowhere explained. Nor is the allegation with respect to failure to list the 16(b) claim as an asset (which at that time would have been contingent in the extreme since (a) the parties, who had to secure tax ruling from the Internal Revenue Service among other things, might not in fact have been able to close the agreement until after December 9, 1967, (b) there was no certainty that a profit would be realized at the time of closing, and (c) Occidental had stated that it had assurances of an exemptive rule from the SEC).

89. Finally, the allegation that but for the foregoing "Occidental would not have dismissed [its] stockholder actions and said Plan would not have closed prior to December 9, 1967" constitutes the wildest of speculation. As previously noted, Occidental's stockholder actions were simply proceedings for the inspection of books and records. They nowhere sought any relief directed against the closing of the Tenneco-Kern transaction. Even had they been continued and been successfully prosecuted, the only relief would have been an inspection of records. How Occidental can allege that as a result of these actions the plan "would not have closed prior to December 9, 1967" is again completely unexplained.

Affidavit of David R. Hyde, Read in Support of Foregoing Motion

90. Occidental alleges that all of the foregoing, like its alleged express agreement not to close pleaded in the fourth affirmative defense, gives rise to an "estoppel" against New Kern's maintenance of 16(b) causes of action against Occidental. As shown in the accompanying memorandum of law, it is clear that estoppel is not a recognized defense to such causes of action. Accordingly, Occidental's fifth affirmative defense should be dismissed as insufficient in fact and law.

Occidental's Sixth Defense (To Counts I and II)

91. For a sixth affirmative defense, this one directed to Counts I and II of New Kern's amended and supplemental complaint (labeled a second affirmative defense to Counts I and II), Occidental alleges that because the option agreement was brought to the attention of Old Kern and its stockholders who approved the Tenneco-Kern Agreement and Plan of Reorganization with full knowledge of said option agreement, any claim for relief based upon the option agreement is barred. This would appear to be another attempt to plead "estoppel", "waiver" or "ratification". As shown in the accompanying memorandum of law, such defenses are not recognized in Section 16(b) causes of action. Accordingly, this defense should be dismissed as insufficient in law.

Occidental's Seventh Defense (To Counts III and IV)

92. For a seventh affirmative defense (labeled as a fifth affirmative defense to Counts III and IV),* Occidental in-

* Both this defense (commencing on page 25 of Occidental's answer) and the affirmative defense commencing on page 10 are labeled as "Fifth" defenses to Counts III and IV.

corporates by reference paragraphs of its counterclaim based on the allegation that the Old Kern common stock was worth more than the Tenneco Preference Stock received in return. This action has been more fully described in Judge Herlands' opinion filed June 23, 1969 determining the motion for a stay of the *Occidental* and *Gall* actions filed February 1969 in the Northern District of California. Occidental alleges that disclosure "of the true value of the assets of Old Kern to Occidental and to its other shareholders would have required Old Kern, Tenneco, Inc., and plaintiff [New Kern] to renegotiate a different and higher proposal and would have led to a later closing date than December 9, 1967".

93. The short of the matter is that the foregoing did not occur. The closing of the Tenneco-Kern transaction on August 30, 1967 is a historical event which did in fact take place. Section 16(b) causes of action obviously cannot be premised upon what might have occurred but only on what did in fact occur.

94. Furthermore, Occidental's allegation that "renegotiation" of the agreement would have meant a closing later than December 9, 1967 is nothing but the sheerest of speculation. Indeed, the original negotiations of the Tenneco-Kern agreement took place during a period commencing May 15, 1967. It was approved by Kern stockholders on July 17, 1967, which is over two months later and closed on August 30, 1967, three and one half months after the commencement of the negotiations. The closing might, indeed, have occurred much sooner if it had not been for the plethora of Occidental-inspired litigation described in Judge Brewster's opinion at 285 F.Supp. 843. Even if Occidental were correct in its allegation that had certain facts been known to Old Kern shareholders at the time

of their meeting on July 17, 1967, they would have rejected the proposal submitted to them, it is impossible to say (as Occidental alleges) that a new agreement could not have been negotiated, approved by shareholders and closed within the period of almost five months between that date and December 9, 1967.

95. Accordingly, Occidental's seventh affirmative defense should be dismissed as unfounded in fact and insufficient in law.

OCCIDENTAL'S COUNTERCLAIMS

96. Four of the seven affirmative defenses pleaded in Occidental's answer also form the basis for counterclaims against New Kern. Each of these is in the nature of a set-off or recoupment against Occidental's 16(b) liability and, we submit, equally insufficient as a counterclaim as it is as an affirmative defense.

Occidental's First Counterclaim

97. Occidental's first counterclaim is based on its allegation with respect to an alleged express agreement not to close the Tenneco-Kern transaction within a six-month period unless Occidental received the ruling it was seeking from the Securities and Exchange Commission. Occidental alleges that the breach of this agreement entitled it to recover "all the damages and expenses it has sustained or will sustain as a result of [New Kern's] breach of contract, which damages and expenses will exceed the amount of plaintiff's claims herein". It is not clear what Occidental is contending by this counterclaim, although it would appear that it is claiming a right to be reimbursed by New

Kern in the event that it has to pay any judgment to New Kern under Section 16(b).

98. It is obvious that the result which Occidental apparently seeks would completely undercut the statutory purpose of Section 16(b). If, on the one hand, Occidental were required, as we believe it should be, to satisfy a 16(b) liability to New Kern, and New Kern were then, in turn, required to pay the same amount back to Occidental for the breach of an alleged agreement not to have such 16(b) liability arise, the result would be a complete "wash". In effect, the Court would be relieving Occidental from any 16(b) liability. The same would be true even if the counterclaim could be, as Occidental attempts, asserted against Tenneco, Old Kern, Cochran (the President of Old Kern) and Montgomery (Chairman of the Board of Old Kern). The effect would be that the insider, the party against whom Section 16(b) is directed, would retain his profit, rather than be forced to disgorge it.

99. Moreover, as previously pointed out herein, the alleged agreement not to close is completely without foundation in fact. Accordingly, Occidental's first counterclaim should be dismissed as insufficient in law and unfounded in fact.

Occidental's Second Counterclaim

100. Occidental's second counterclaim is based upon the alleged implied agreement or alleged representation that there would be no closing of the Tenneco-Kern transaction prior to December 9, 1967. We submit that this counterclaim is equally insufficient in law and unfounded in fact as Occidental's first counterclaim.

Affidavit of David R. Hyde, Read in Support of Foregoing Motion

Occidental's Third Counterclaim

101. Occidental's third counterclaim is based upon the alleged violation of the Knox County, Texas restraining order. Occidental alleges that by reason of alleged contemptuous acts, it "has been subjected to numerous claims and actions under Section 16(b) of the Exchange Act of 1934 totalling more than $20,000,000 including interest, and has been required to incur substantial expense and attorney fees to defend said claims and actions, for which recovery is sought against plaintiff in this action".

102. As is the case with Occidental's first and second counterclaim, it would appear that Occidental is attempting by reason of this third counterclaim to recover over against New Kern, Tenneco, Old Kern, Cochran and Montgomery for the amount of any 16(b) liability which might be imposed against it.

103. For the reasons set forth above in discussing Occidental's first counterclaim, New Kern submits that this counterclaim is entirely insufficient in law. In addition, as pointed out above, the factual premise upon which it is based is completely unfounded. New Kern respectfully submits that Occidental's third counterclaim should be dismissed as insufficient in law and unfounded in fact.

Occidental's Seventh Counterclaim

104. Occidental's seventh affirmative defense (labeled Occidental's fifth defense to Counts III and IV), forms a basis for its seventh counterclaim. Occidental alleges that if the "true value of the assets of Old Kern" had been disclosed, Tenneco and Kern would have had "to renego-

tiate a different and higher proposal" leading to a closing date beyond December 9, 1967. Occidental goes on to allege that as a result it "has been subjected to Section 16(b) claims and expenses in excess of $20,000,000, and has been damaged in an amount also in excess of $20,000,000".

105. Again, this counterclaim appears to be an effort on Occidental's part to undercut the effects of its Section 16(b) liability. For the reasons previously discussed, it should be rejected as insufficient in law and unfounded in fact.

CONCLUSION

106. For the reasons set forth above, New Kern respectfully submits that its motion should be granted, and that judgment should be entered against Occidental Petroleum Corporation pursuant to Section 16(b) of the Securities Exchange Act.

DAVID R. HYDE

(Sworn to May 6, 1970.)

Exhibit A, Annexed to Foregoing Affidavit

OCCIDENTAL'S TENDER OFFER

(PHOTOSTATS)

(See opposite ☛)

COPY BOUND CLOSE IN CENTER

EXHIBIT A, ANNEXED to FOREGOING AFFIDAVIT

Wall Street Journal
Wednesday, May 10, 1967 (p. 24)

ADVERTISEMENT

OFFER TO PURCHASE 500,000 SHARES OF CAPITAL STOCK OF

KERN COUNTY LAND COMPANY

AT $83.50 PER SHARE NET
SCHEDULED TO EXPIRE JUNE 8, 1967

To the Holders of Common Stock of
KERN COUNTY LAND COMPANY

Occidental Petroleum Corporation ("Occidental"), offers to purchase from you and other holders of Capital Stock of Kern County Land Company (the "Company"), all shares of such Capital Stock (up to the limit hereinafter set forth) tendered in proper form at $83.50 per share net, in cash, under the terms set forth herein and in the Letter of Transmittal. This offer will terminate at 5:00 p.m. Pacific Daylight Time on June 8, 1967, unless extended. Payment for shares tendered on or prior to June 8, 1967, will be made as soon as practicable thereafter. No shares tendered will be transferred on or prior to May 15, 1967, the record date of a dividend recently declared payable on June 21, 1967 to shareholders of record on May 15, 1967. Thus shareholders who tender their shares prior to May 16, 1967, will receive such dividend.

In the event that the Company shall, during the period of the offer, declare any stock dividend, or split or combine its shares of Capital Stock, the price offered hereunder shall be appropriately adjusted.

The closing price of the Capital Stock of the Company on the New York Stock Exchange on May 8, 1967, the date prior to the announcement of the offer, was $63¾.

The price ranges of the Capital Stock on that Exchange since January 1, 1966, according to published information, have been as follows:

	High	Low
1966:		
First Quarter	75	66
Second Quarter	76¼	62½
Third Quarter	68¾	56
Fourth Quarter	65¾	57
1967:		
First Quarter	64¾	53
Second Quarter (thru May 5)	63¾	57¾

Occidental will purchase all shares properly tendered by the expiration of the offer, up to 500,000 shares. Occidental may at its option purchase all or any part of any shares tendered in excess of 500,000 shares.

Should Occidental elect to purchase less than all shares tendered, the shares to be purchased will be selected in order of receipt by either of the Tender Agents of the Letters of Transmittal, duly executed by the person tendering, with respect to such shares. Accordingly, if less than all shares tendered are purchased, preference will be given to those first received and these shares will be purchased in full. There will be no pro-rata allocation of purchases. All questions concerning the order of receipt of tendered shares will be determined by the Tender Agents, whose decision will be final. Certificates for any shares not purchased will be returned as soon as practicable after the termination of this offer.

Holders of the Capital Stock of the Company desiring to tender their shares should transmit their certificates of stock accompanied by the Letter of Transmittal to the Tender Agent or to their own securities dealer for transmittal to the Tender Agent.

Holders of Capital Stock of the Company who have stock held by and registered in the name of a broker or dealer are urged to contact their broker or dealer promptly, if they desire to tender their shares.

A tender of shares may be made without delivery of certificates therefore by a bank or trust company or a member of a national securities exchange who will guarantee in writing or by telegram the delivery of certificates for such shares, in proper form for transfer, not later than five business days after the Tender Agent shall give notice of acceptance of such shares.

Members of the National Association of Securities Dealers, Inc. and members of any national securities exchange soliciting shares in accordance with the terms of this offer, if their name appears on the Letter of Transmittal accompanying the tender, will be allowed a commission of $1.50 per share on shares purchased (to be paid by Occidental). Occidental has also retained Georgeson & Co., Inc. to assist in the solicitation.

Occidental may, at its option, extend this offer. Public notice of any such extension will be given. All tenders are irrevocable until the shares are purchased or returned, regardless of any extension.

Occidental reserves the right, during the period of this offer, to purchase shares of Capital Stock of the Company on the New York Stock Exchange, or otherwise, at prices, exclusive of brokerage commissions, not in excess of the price set forth in the first paragraph hereof.

Forms of the Letter of Transmittal may be obtained from any participating securities dealer or from either of the Tender Agents named below. The completed form of Letter of Transmittal and certificates for your stock in proper form for transfer should be sent by you, your bank or broker to either of the Tender Agents.

The Chase Manhattan Bank—N.A.
Corporate Agency Department
80 Pine Street (2nd Floor)
New York, New York 10015

Bank of America, NT&SA
Corporate Trust—Stock Transfer
One South Van Ness Avenue
San Francisco, California 94120

Occidental reserves the right to waive any of the terms and conditions of this offer or any defect in the tendering of shares.

MAY 9, 1967

Very truly yours,

OCCIDENTAL PETROLEUM CORPORATION

LETTER OF TRANSMITTAL

IMPORTANT: Complete this letter carefully and deliver it with your stock certificates promptly. This letter must be received by the Tender Agent prior to 5:00 P.M. (Pacific Daylight Time), on June 8, 1967, unless this offer is extended.

To: THE CHASE MANHATTAN BANK
(National Association)
Corporate Agency Department
80 Pine Street, 2nd Floor
New York, New York 10015

To: BANK OF AMERICA, NT&SA
Corporate Trust—Stock Transfer
One South Van Ness Avenue
San Francisco, California 94120

Gentlemen:

Referring to the Purchase Offer of Occidental Petroleum Corporation (the "Purchaser"), dated May 8, 1967, to purchase shares of the Capital Stock of Kern County Land Company (the "Company"), at $83.50 per share net, the undersigned irrevocable tenders such offer on the terms and conditions therein and herein set forth and on the reverse hereof, and hereby deposits or irrevocably causes to deposit with you the following certificates representing shares of such stock, properly endorsed for transfer to the Purchaser:

BLURRED COPY

Certificate Number(s)	Number* of Shares Tendered	Total Number of Shares Represented by Certificates
	*All shares represented by certificates listed are deemed to have been tendered unless otherwise indicated in this space.	

Notes: If space is inadequate, certificate numbers and numbers of shares may be listed on a separate schedule affixed hereto. If certificate numbers are not known, so state.

If the certificates representing the shares tendered hereby are not enclosed, a member firm of a national securities exchange or a commercial bank or trust company must guarantee in the space provided below that such certificates will be deposited with you no later than 5 business days after notice from you to such member, bank or trust company that this tender has been accepted by the Purchaser.

The undersigned hereby warrants that the undersigned has full authority to sell and transfer the above mentioned shares, and that the Purchaser will acquire good and unencumbered title thereto, free and clear of all liens, charges and encumbrances and not subject to any adverse claim, when the same are purchased by it. The undersigned will, upon request, execute any additional documents necessary or desirable to complete the sale and transfer of the above-described shares.

ASSIGNMENT

In consideration of the offer cited above and the payment of the purchase price specified therein, the undersigned hereby sells, assigns and transfers unto the Purchaser the shares of Capital Stock of the Company represented by the above described certificates, and hereby irrevocably constitutes your attorney to transfer said shares on the books of the Company with full power of substitution in the premises.

You are to deliver the stock certificates (or such portion thereof as represents shares being purchased), together with all accompanying evidences of authority, to or upon the order of the Purchaser against receipt by you as agent for the undersigned of the purchase price for such shares stated in the aforesaid offer. Delivery by you of such stock to the Purchaser shall be conclusive as to the performance of all conditions necessary to make this Letter of Transmittal effective.

TO BE USED ONLY IF CERTIFICATES ARE NOT TRANSMITTED HEREWITH

The undersigned,

- ☐ a member of a national securities exchange,
- ☐ a commercial bank,
- ☐ a trust company,

guarantees to deliver to the Tender Agent certificates in proper form for transfer for the shares tendered by this Letter of Transmittal not later than 5 business days after notice of acceptance hereof by the Purchaser is given by the Tender Agent.

SIGN HERE.....
Authorized Signature

Please mail the check for the purchase price to the undersigned at the address shown below—unless otherwise indicated in the Special Payment Instructions below. If any of the shares mentioned above are not purchased by the Purchaser, please return the stock certificates representing such shares (and accompanying documents, as appropriate) to the undersigned at the address shown below—unless otherwise indicated in the Special Delivery Instructions below.

The undersigned understands and agrees that you shall not be liable hereunder for any act or omission of the Purchaser.

SPECIAL PAYMENT INSTRUCTIONS
To be completed ONLY if proceeds are to be paid to other than the registered holder(s).
Issue and mail check to:

Name.....
(Please print)

Address.....
(Give Zip Code No., if any)

.....

SPECIAL DELIVERY INSTRUCTIONS
To be completed ONLY if certificates are to be returned to other than the registered holder(s).
Mail certificates to:

Name.....
(Please print)

Address.....
(Give Zip Code No., if any)

.....

Very truly yours,

Dated....., 1967.

Please Sign ☞ .....

To be used if tender solicited by dealer or broker:

This tender was solicited by:

Firm name of dealer or broker—PLEASE PRINT

Address—PLEASE PRINT

Signature of registered holder. (Must be signed by registered holder(s) exactly as name appears in certificate(s) or by person(s) authorized to become registered holder(s) by certificates and documents transmitted.)

Address.....

.....

INSTRUCTIONS FOR TENDER OF SHARES IN ACCEPTANCE OF OFFER

1. Each holder of Kern County Land Company stock desiring to accept the offer should as soon as possible mail or deliver this Letter of Transmittal completely filled in and signed as specified herein together with the certificates representing his shares (unless delivery has been guaranteed as provided herein) and all documents required below, if any, to either of the Tender Agents, The Chase Manhattan Bank (National Association), Corporate Agency Department, 60 Pine Street, 2nd Floor, New York, New York 10015 or Bank of America, NTSA, Corporate Trust—Stock Transfer, One South Van Ness Avenue, San Francisco, California 94120.

2. Stock certificates must be either (a) duly endorsed in blank or (b) accompanied by duly executed stock powers with, in either case, signatures guaranteed by a commercial bank or trust company or a broker who is a member of a national securities exchange.

3. If this instrument is executed by an officer on behalf of a corporation, or by an executor, administrator, trustee, guardian, attorney, agent or other person acting in a fiduciary or representative capacity, proper documentary evidence must be furnished of the authority of the person executing the same. Questions as to the sufficiency of such evidence of authority may be referred to either of the Tender Agents. In cases where the person signing the Letter of Transmittal is not the registered holder of the stock certificates tendered thereby, such certificates must either be endorsed in blank or accompanied by duly executed stock powers, signatures guaranteed, evidencing proper assignment of the tendered shares to the person signing such Letter of Transmittal.

4. No stock transfer tax stamps, or funds to cover such stamps, need accompany this instrument. The Purchaser will pay any stock transfer taxes applicable to the transfer and sale to it. If payment of the purchase price is to be made to an assignee of the registered holder, or if deposited stock certificates are to be registered in the name of the person signing the Letter of Transmittal, the amount of any stock transfer taxes on account of the transfer to such assignee or such person will be deducted from the purchase price, if evidence of the payment of such tax is not submitted.

5. The method of delivery of this instrument, the stock certificates, and documents (if any) is at the option and risk of the holder, but the delivery will be deemed effective only when actually received by either of the Tender Agents. If such delivery is by mail, it is suggested that insured registered mail be used.

6. The Purchaser, entirely at its election, may waive any of the specified conditions of its offer, in the case of any shares or shares tendered or purchased to be tendered.

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Exhibit B, Annexed to Foregoing Affidavit

NOTICE OF EXTENSION OF OCCIDENTAL'S TENDER OFFER

(PHOTOSTAT)

(See opposite ☛)

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EXHIBIT B, ANNEXED to FOREGOING AFFIDAVIT

Wall Street Journal
Monday, May 15, 1967

IMPORTANT NOTICE

OFFER TO PURCHASE
CAPITAL STOCK
OF
KERN COUNTY LAND COMPANY
AT
$63.50 PER SHARE NET
ORDER-OF-RECEIPT BASIS

Occidental Petroleum Corporation made an Offer, dated May 8, 1967, to purchase the first 500,000 shares of Kern County Land Company's Capital Stock tendered in accordance with the Offer, reserving the right to purchase any or all additional shares tendered, on the basis of order of receipt.

Response of Kern County Land Company stockholders to the Offer resulted in the tender of more than 500,000 shares during the first three days of the Offer. Occidental Petroleum Corporation hereby announces that it will purchase on an order-of-receipt basis the next 500,000 shares, subject to the terms of the Offer. The right is reserved to purchase all or any part of any shares tendered in excess of the next 500,000. Preference will be given to those received first.

Stockholders of Kern County Land Company have the following alternatives:

(1) Hold their stock, with the risk of market fluctuation after the Offer.

(2) Sell in a regular transaction on the New York or Pacific Coast Stock Exchange at prevailing prices, which during the first week of the offer were $17 to $20 higher than the price on the last trading day prior to the Offer.

(3) Tender their stock under the terms of the Offer.

Stockholders are strongly urged to consult as soon as possible with any reputable independent financial advisor regarding the fairness and adequacy of this Offer.

It is respectfully suggested that Kern County Land Company management's recent letter and telegram to stockholders should not be taken as a basis for an informed decision on this important matter.

On the last trading day prior to the announcement of this Offer, the closing price of Kern County Land Company's stock on the New York Stock Exchange was $63-5/8. The range from 1964 through May 5, 1967, according to published sources, was as follows:

	High	Low
1964	70⅜	56⅛
1965	71½	58
1966	76¼	51¼
1967 (thru May 5)	64⅞	57⅜

Copies of the Offer, which is subject to the above amendment regarding the additional shares to be purchased, and copies of the Letter of Transmittal may be obtained from:

- Any participating securities dealer
- Either Tender Agent listed below
- Any office of Georgeson & Co.

Members of the NASD or of any national securities exchange will be allowed a commission of $1.50 per share on all shares purchased if their name appears on the accompanying Letter of Transmittal.

Your bank or broker will assist you in tendering your shares and answering any questions you may have. Assistance also may be obtained from the Tender Agents or Georgeson & Co.

The Chase Manhattan Bank
(National Association)
Corporation Agency Department
30 Pine Street (2nd Floor)
New York, New York 10015

Bank of America, N.T.&S.A.
Corporation Trust Stock Transfer
1 South Van Ness Avenue
San Francisco, California 94120

Georgeson & Co.
44 Sutter Street
San Francisco, Calif. 94104
(415) 982-3633

Georgeson & Co.
52 Wall Street
New York, New York 10005
(212) 422-1470

Georgeson & Co.
630 South Spring Street
Los Angeles, Calif. 90014
(213) 624-6781

This offer expires at 5:00 P.M. June 8, 1967 (Pacific Daylight Time) unless extended, or earlier if the company so chooses under the terms of the offer as amended.

OCCIDENTAL PETROLEUM CORPORATION
10889 Wilshire Boulevard, Suite 1500
Los Angeles, California 90024 (213) 879-1700

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Exhibits C-1 Through C-4, Annexed to Foregoing Affidavit

ONE COPY OF FORM 3 AND THREE COPIES OF FORM 4 FILED BY OCCIDENTAL WITH SECURITIES AND EXCHANGE COMMISSION

(PHOTOSTATS)

(See opposite ☛)

EXHIBITS C-1 through C-4,
ANNEXED to FOREGOING AFFIDAVIT.

SECURITIES AND EXCHANGE COMMISSION
Washington 25, D.C.

FORM 3

INITIAL STATEMENT OF BENEFICIAL OWNERSHIP OF SECURITIES

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935, or Section 30(f) of the Investment Company Act of 1940.

KERN COUNTY LAND COMPANY
(Name of issuer company, holding company or investment company)

Occidental Petroleum Corporation
(Name of person whose ownership is reported)

10889 Wilshire Boulevard, Suite 1500, Los Angeles, California, 90024
(Business address of such person) (street, city, zone, state)

Relationship of such person to company named above. (See instruction 6) Beneficial owner of more than 10% of the Kern County Land Company capital stock. *

Date of event which requires the filing of this statement (See instruction 6) May 10, 1967

SECURITIES BENEFICIALLY OWNED (See instruction 7)

TITLE OF SECURITY (See instruction 8)	NATURE OF OWNERSHIP (See instruction 8)	AMOUNT OWNED beneficially (See instruction 10)
Capital Stock Par Value - $2.50 per share	Direct	507,055

* Occidental Petroleum Corporation has no direct knowledge of the number of outstanding shares of capital stock of Kern County Land Company. On the basis of the report on Form 10-K filed by Kern County Land Company on February 27, 1967, Occidental Petroleum Corporation has assumed that there are outstanding 4,323,140 shares of Kern County Land Company capital stock.

REMARKS: (See instruction 11)

OCCIDENTAL PETROLEUM CORPORATION

Date of statement May 18, 1967

By [signature] Secretary
(Signature) Paul C. Hadaker

5

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 4

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP OF SECURITIES

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935, or Section 30(f) of the Investment Company Act of 1940.

KERN COUNTY LAND COMPANY
(Name of listed company, holding company or investment company)

Occidental Petroleum Corporation
(Name of person whose ownership is reported)

10889 Wilshire Boulevard, Suite 1500, Los Angeles, California 90024
(Business address of such person: street, city, zone, state)

Relationship of such person to company named above. (See instruction 6) Beneficial owner of more than 10% of the Kern County Land Company capital stock

Statement for Calendar Month of May, 19 67

CHANGES DURING MONTH AND MONTH-END OWNERSHIP (See instruction 6)

TITLE OF SECURITY (See instruction 7)	DATE OF TRANSACTION (See instruction 6)	AMOUNT BOUGHT or otherwise acquired (See instruction 6)	AMOUNT SOLD or otherwise disposed of (See instruction 6)	NATURE OF OWNERSHIP (See instruction 10)	AMOUNT OWNED beneficially at end of month (See instruction 6)
Capital Stock Par Value $2.50 per share	May 1967	376,326*		Direct	883,381

REMARKS: (See instruction 11)

* Acquired at various dates during May pursuant to Occidental Petroleum Corporation's tender offer to Kern County Land Company shareholders.

OCCIDENTAL PETROLEUM CORPORA

By _____ (Signature)
Paul C. Hebner Secretary

Date of statement June 9, 1967

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 4

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP OF SECURITIES

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935, or Section 30(f) of the Investment Company Act of 1940

KERN COUNTY LAND COMPANY
(Name of listed company, holding company or investment company)

Occidental Petroleum Corporation
(Name of person whose ownership is reported)

10889 Wilshire Boulevard, Suite 1500, Los Angeles, California 90024
(Business address of such person: street, city, zone, state)

Relationship of such person to company named above. (See instruction 6) Beneficial owner of more than 10% of the Kern County Land Company capital stock

Statement for Calendar Month of June, 1967

CHANGES DURING MONTH AND MONTH-END OWNERSHIP (See instruction 6)

TITLE OF SECURITY (See instruction 7)	DATE OF TRANSACTION (See instruction 8)	AMOUNT BOUGHT or otherwise acquired (See instruction 8)	AMOUNT SOLD or otherwise disposed of (See instruction 8)	NATURE OF OWNERSHIP (See instruction 10)	AMOUNT OWNED beneficially at end of month (See instruction 8)
Capital Stock Par Value $2.50 per share	June 1967	3,392*		Direct	886,773

REMARKS: (See instruction 11)

* Acquired at various dates during June pursuant to Occidental Petroleum Corporation's tender offer to Kern County Land Company shareholders, which expired on June 8, 1967.

Date of statement June 30, 1967

Paul C. Hebner (Signature) Secretary

C-7

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

AMENDED

FORM 4

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP OF SECURITIES

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935, or Section 30(f) of the Investment Company Act of 1940.

KERN COUNTY LAND COMPANY

(Name of issuer company, holding company or investment company)

Occidental Petroleum Corporation

(Name of person whose ownership is reported)

10889 Wilshire Boulevard, Suite 1500, Los Angeles, California 90024

(Business address of such person) (street, city, state, state)

Relationship of such person to company named above. (See instruction 9) Beneficial owner of more than 10% of the Kern County Land Company Capital Stock.

AMENDED Statement for Calendar Month of JUNE, 19 67

CHANGES DURING MONTH AND MONTH-END OWNERSHIP (See instruction 6)

TITLE OF SECURITY (See instruction 7)	DATE OF TRANSACTION (See instruction 8)	AMOUNT BOUGHT or otherwise acquired (See instruction 8)	AMOUNT SOLD or otherwise disposed of (See instruction 8)	NATURE OF OWNERSHIP (See instruction 10)	AMOUNT OWNED beneficially at end of month (See instruction 9)
Capital Stock Par Value - $2.50 per sh.	June 1967	4,168 *		Direct	887,549

REMARKS: (See instruction 11)

*Acquired at various dates during June, 1967, on or before June 8, 1967, pursuant to Occidental Petroleum Corporation's tender offer to Kern County Land Company shareholders, which expired on June 8, 1967.

Date of statement Sept. 7, 1967

(Signature)

Exhibit D, Annexed to Foregoing Affidavit

AGREEMENT AND PLAN OF REORGANIZATION, DATED AS OF JUNE 1, 1967 (EXHIBIT A OMITTED)

(PHOTOSTATS)

(See opposite ☛)

EXHIBIT D, ANNEXED to FOREGOING AFFIDAVIT

[Conformed Copy]

AGREEMENT AND PLAN
of
REORGANIZATION

Among

KERN COUNTY LAND COMPANY,
TENNECO INC.
and
KCL CORPORATION

Dated as of June 1, 1967

AGREEMENT AND PLAN OF REORGANIZATION

This Agreement and Plan of Reorganization made as of the 1st day of June, 1967, among Ker COUNTY LAND COMPANY, a California corporation (hereinafter sometimes called "Kern") with its princip office and place of business at San Francisco, California, TENNECO INC., a Delaware corporation (herei after called "Tenneco") with its principal office and place of business at Houston, Texas, and KC CORPORATION, a Delaware corporation (hereinafter sometimes called "KCL") with its principal office a place of business at San Francisco, California.

RECITALS

The Agreement and Plan of Reorganization will comprise the transfer to KCL of all of the asse properties, business and goodwill of Kern (and the assumption by KCL of Kern's liabilities, all as herei after provided) in exchange solely for shares of $5.50 Cumulative Convertible Preference Stock (votin of Tenneco owned or to be owned by KCL, the prompt dissolution of Kern and the distribution of su shares to the shareholders of Kern, all upon and subject to the terms and conditions of this Agreeme and Plan of Reorganization. The Boards of Directors of Kern, Tenneco and KCL have heretofore approv this Agreement and Plan of Reorganization, and this agreement is made subject to the approval of t shareholders of each such corporation, as hereinafter provided.

In consideration of the mutual benefits to be derived from this Agreement and Plan of Reorganizati and of the mutual agreements herein contained, the parties hereto do hereby agree as follows:

ARTICLE I.

Representations and Warranties of Kern

1.1 Kern is a corporation duly organized and existing and in good standing under the laws of t State of California, and is qualified to do business and is in good standing as a foreign corporation in t States of Arizona, Colorado, Idaho, Louisiana, Mississippi, Montana, Nebraska, New Mexico, Oregu Texas, Utah and Wyoming, and in the Commonwealth of Australia (New South Wales, Queensland a Western Australia), and in the Dominion of Canada (Alberta, British Columbia, Manitoba, Northwest Ter tories and Yukon Territory and Saskatchewan) and in British Honduras.

1.2 The authorized capital stock of Kern consists of 8,000,000 shares of capital stock all of one cl and of the par value of $2.50 per share, of which 4,330,440 shares have been validly issued and are no outstanding and are fully paid and nonassessable. Kern has outstanding as of the date hereof unexercis qualified and restricted stock options which cover 25,338 shares of the capital stock of Kern, 5,370 sha of which will be exercisable by option holders at or immediately prior to the "Closing Date", and 19,968 sha of which will not be exercisable by option holders at the "Closing Date", as that term is hereinafter defin The capital stock of Kern is listed on the New York and Pacific Coast Stock Exchanges.

1.3 Kern has the following wholly owned subsidiaries, each of which is duly incorporated and valid existing in good standing in the jurisdiction of its incorporation and is duly qualified and in good standi as a foreign corporation in the jurisdictions in which it is qualified to do business or where the charac of its properties or the nature of its business makes such qualification necessary:

Kern (Philippines), Inc., a Philippine corporation
Casa De Los Cuestos, Inc., a California corporation
Bellevue Farming Company, a California corporation
Boquillas Cattle Company, an Arizona corporation
Calloway Farming Company, a California corporation
Canfield Farming Company, a California corporation
Elmo Farming Company, a California corporation
KCL Development Company, a California corporation

Kern Fruit Company, a California corporation
Kern Lake Farming Company, a California corporation
Kimberlina Farming Company, a California corporation
Lerdo Farming Company, a California corporation
Mill Potrero Corporation, a California corporation
Poso Farming Company, a California corporation
Rosedale Farming Company, a California corporation
Tulefield Farming Company, a California corporation
Victorio Land and Cattle Company, a California corporation
Wheeler Ridge Farming Company, a California corporation
Kern County Canal and Water Company, a California corporation, which in turn has the following subsidiaries (wholly owned except as otherwise indicated):

Anderson Canal, Inc., a California corporation
Central Canal Company, a California corporation
James Canal, Inc., a California corporation
Joyce Canal, Inc., a California corporation
Kern-Boquillas Company, a California corporation
Lerdo Canal Company, a California corporation
Pioneer Canal, Inc., a California corporation
Plunket Canal, Inc., a California corporation
Kern River Canal and Irrigating Company, a California corporation, with 2,500 shares (all of one class) issued and outstanding of which Kern County Canal and Water Company owns 2,471¼ shares
Kern Island Canal, Inc., a California corporation, in which Kern County Canal and Water Company owns 99.8% of all of the issued and outstanding stock.

Stockdale Development Corporation, a California corporation, which in turn has the following wholly owned subsidiaries:

Broadview Sanitation Company, a California corporation, and
Ashe Water Company, a California corporation

Walker Manufacturing Company, a Delaware corporation (hereinafter called "Walker"), which in turn has the following subsidiaries:

Galt Metal Industries Limited, a Canadian corporation (100% owned by Walker), which in turn has the following subsidiary:

Walker Marketing of Canada, Limited, a Canadian corporation (100% owned by Galt)

DeKoven Corporation, a Michigan corporation (100% owned by Walker)
DeKoven Manufacturing Co., a Wisconsin corporation (100% owned by Walker), and
Ajax Manufacturing Corporation of Wisconsin, a Wisconsin corporation (100% owned by Walker)

Additionally, Kern has the following subsidiaries in which it owns unqualifiedly the percentage of equity interest as indicated, each of which is duly incorporated and validly existing in good standing in the jurisdiction of its incorporation and is duly qualified and in good standing as a foreign corporation in the jurisdiction in which it does business or where the character of its properties or the nature of its business makes such qualification necessary:

Watkins-Johnson Company, a California corporation, in which Kern owns 701,500 shares or 57.067% of all of the issued and outstanding stock.

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J. I. Case Company, a Wisconsin corporation (hereinafter called "Case"), in which Kern owns 53.8% (2,366,259 shares) of the common stock, 100% of the 5¾% cumulative preferred stock and 56.3% of the Series A preferred stock. Case has the following 100% owned subsidiaries:

J. I. Case Credit Corporation (hereinafter called "Case Credit"), a Wisconsin corporation
Case Power and Equipment Limited, a Wisconsin corporation
J. I. Case do Brazil Commercio e Industria Limitada, a Brazilian corporation
J. I. Case Company Limited, an English Private Company
J. I. Case (South Africa) Pty. Limited, a Union of South Africa corporation
J. I. Case Threshing Machinery Company Limited, a Canadian corporation
J. I. Case International, S.A., a Venezuelan corporation
The Case Company, a Wisconsin corporation
Lyon County Implement Company, a Minnesota corporation
Compagnie des Tracteurs, a French corporation
Colt Manufacturing Company, Inc., a Wisconsin corporation

and the following subsidiaries in which Case owns unqualifiedly the percentage of equity interest as indicated:

J. I. Case (Australia) Pty. Limited, a corporation under the laws of New South Wales, Australia in which Case owns 97% interest and in which J. I. Case (Holdings) Pty. Limited owns 3%

J. I. Case (Holdings) Pty. Limited in which Case owns 76.5% and J. I. Case (Australia) Pty. Limited owns 23.5%

Societe Francaise Case de Material Agricole et Industrial, a French corporation, in which Case owns 55.2%

Societe de Francaise Immobiliere (Francim), a French corporation, in which Case owns directly or indirectly 55.92%

All of the Case subsidiaries are duly incorporated and validly existing in good standing in the jurisdictions of their respective incorporations and are qualified as foreign corporations and in good standing in the jurisdictions in which they do business or where the character of their properties or the nature of the business makes such qualification necessary.

Throughout this Agreement and Plan of Reorganization, the term "Kern and its Subsidiaries" means Kern County Land Company and all of its subsidiaries, the term "Kern and its Consolidated Subsidiaries" means Kern County Land Company and all of its subsidiaries except J. I. Case Company and its subsidiaries, the term "Unconsolidated Subsidiaries" means J. I. Case Company and its subsidiaries, and the term "Case and its Consolidated Subsidiaries" means J. I. Case Company and all of its subsidiaries except Case Credit, and the three French subsidiaries listed above.

Additionally, Kern or a subsidiary of Kern has equity interests or investments in the companies or projects, or rights of participation or membership in the associations, clubs and other organizations, briefly described in Schedule I which has been delivered by Kern to Tenneco and KCL concurrently herewith and which identifies the Consolidated Balance Sheet upon which such interest or investment is shown.

1.4 Annexed hereto as Exhibit A are the following financial statements as they relate to Kern and its Consolidated Subsidiaries, Case and its Consolidated Subsidiaries and Case Credit:

Kern and Consolidated Subsidiaries

1. Unaudited Balance Sheet as of April 30, 1967 and Statements of Earnings, Reinvested Earnings and Capital Surplus for the six months ended on such date.

2. Audited Balance Sheet as of October 31, 1966.

3. Audited Summary of Earnings for the years ended December 31, 1962, 1963 and 1964, and the years ended October 31, 1965 and 1966.

4. Audited Statements of Capital Surplus and Reinvested Earnings for the two years and ten months ended October 31, 1966.

Items 2, 3 and 4 above are certified by Haskins & Sells, independent public accountants.

Case and Consolidated Subsidiaries

1. Unaudited Statement of Financial Condition as of April 30, 1967 and Statements of Income, Earnings Retained and Capital in Excess of Par Value for the six months ended April 30, 1967.

2. Audited Statement of Financial Condition as of October 31, 1966 and Audited Statements of Income, Earnings Retained and Capital in Excess of Par Value for the three years ended October 31, 1964, 1965 and 1966, certified by Price Waterhouse & Co. for the year ended October 31, 1964, and by Haskins & Sells as of October 31, 1966 and for the years ended October 31, 1965 and 1966.

Case Credit

1. Unaudited Statement of Financial Condition as of April 30, 1967 and Statement of Income and Earnings Retained for the six months then ended.

2. Audited Statement of Financial Condition as of October 31, 1966 and Audited Statements of Income and Earnings Retained for the three years ended October 31, 1964, 1965 and 1966, certified by Price Waterhouse & Co. for the year ended October 31, 1964, and by Haskins & Sells for the years ended October 31, 1965 and 1966.

Delivered concurrently herewith are the Combined Balance Sheet as of October 31, 1966 and the Combined Statement of Income and Deficit for the year then ended certified by Deloitte, Plender, Haskins & Sells, and the Combined Statements of Income and Deficit for the two years ended October 31, 1964 and 1965, of Case's two French subsidiaries, Societe Francaise Case de Materiel Agricole et Industriel, S.A. and Compagnie des Tracteurs S.A. The investment in the third Case French subsidiary, Societe Francaise Immobiliere (Francim), Vierzon, is shown in the aforesaid Balance Sheet and Statements. Kern anticipates the early delivery to it of the Balance Sheet of such Case subsidiaries as of March 31, 1967 and the related Statement of Income and Deficit for the five months then ended, and upon receipt thereof Kern will make prompt delivery thereof to Tenneco and KCL.

1.5 None of the officers of Kern knows of any materially significant assets or liabilities, absolute or contingent, which are not shown, referred to or provided for in the unaudited Consolidated Balance Sheets (or in the notes thereto) of Kern and its Consolidated Subsidiaries, Case and its Consolidated Subsidiaries and Case Credit, each dated April 30, 1967, and the audited Combined Balance Sheet of the Case French subsidiaries dated October 31, 1966 attached hereto as a part of Exhibit A, delivered concurrently herewith, or referred to in Schedule I.

1.6 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule I is a description, tabulation and list of types of real property interests (total or partial) owned by or leased to Kern or any of its Consolidated Subsidiaries, Case or any of its Consolidated Subsidiaries (except the Case subsidiaries of foreign domicile) and Case Credit. Schedule I describes generally the agricultural and grazing lands, the lands of mineral classifications, the mineral acreage and royalty acreage interests, the rights-of-way, easements, servitudes and agreements incident to the operation of irrigation and canal subsidiaries, the leases in which Kern and its Consolidated Subsidiaries, Case and its Consolidated Subsidiaries, or Case Credit is Lessor or Lessee and any and all other interests in lands owned or held by such companies. Schedule I also includes a general description of the improvements, plants, and structures owned and held by or leased to any of such companies together with gross book value, book reserve for depreciation, and net book value of such real estates and their improvements (separated into classes of real estate holdings and identified as to the particular use to which such real estate holdings and improvements incident thereto are presently being adapted). The parties hereto have agreed that Schedule I is insufficiently detailed to identify or be usable in the preparation of descriptions for identification and conveyancing of the lands and interests in lands and the improvements purported to be covered thereby, and Kern has agreed to substitute for Schedule I

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a detailed and sufficient description of all such property at the earliest practicable date (but no lat August 1, 1967) for the purposes of identification and warranties, and in the case of Kern itself, conve also. Nonetheless, Kern represents that Kern and its Consolidated Subsidiaries, Case and its Consolidat sidiaries and Case Credit own, hold or lease the classes of real estate shown in said Schedule I for the p for which such interests in real estate are presently being held or leased, and that Kern's officers kno material defects of title or claims adverse to Kern and its Subsidiaries, Case and its Consolidated Subsi or Case Credit which would interfere with the continued use of such properties for the purposes fo they are presently used or adapted, and that the valuations (gross book and net book) and reserves for ciation are accurate and that the bases of valuation, depreciation and amortization with respect to all suc erty as described in Schedule I are those being used by such companies and are proper.

Kern and its Consolidated Subsidiaries own outright all of the machinery and equipment in the pla other improvements referred to in Schedule I, except as may otherwise be indicated therein and Ker Consolidated Subsidiaries own outright all other assets and properties reflected in the unaudited Sheet of Kern and its Consolidated Subsidiaries as of April 30, 1967 annexed hereto as a part of A or acquired by it or any such Subsidiary after said date, other than such assets and properties otherwise disposed of in the ordinary course of business subsequent to said date, in each case, f clear of all mortgages, liens or encumbrances of any nature whatsoever, except liens of the types to in clauses (a) and (b) of subparagraph 1.17 (v) hereof.

On information furnished by the officers of Case and Case Credit, the officers of Kern are opinion that Case and its Consolidated Subsidiaries and Case Credit own outright all of the ass properties reflected in the unaudited Balance Sheets of said companies as of April 30, 1967 annexed as a part of Exhibit A or acquired by them after such date, other than assets and properties sold o wise disposed of in the ordinary course of business subsequent to such date, in each case free a of all mortgages, liens and encumbrances of any nature whatsoever, except liens of the type to in clauses (a) and (b) of subparagraph 1.17(v) hereof and except for mortgages, liens and encum referred to in Schedule I. On such information the officers of Kern likewise believe that Case and its dated Subsidiaries and Case Credit own outright all of their plants, improvements, buildings, and the ma and equipment used in or acquired for use in connection with such plants, buildings or improvements, e otherwise generally shown in Schedule I as leased property. The Schedule to be substituted for Sched or before August 1, 1967 will particularly describe and segregate the plants, buildings and improveme the machinery and equipment incident thereto as to that which is owned or leased.

If in the course of the investigation being conducted by Tenneco and KCL of the title ownership of any such real or personal property and the interests therein of Kern and its Cons Subsidiaries, Case and its Consolidated Subsidiaries and Case Credit it shall be determined th title to or ownership of any substantial portion thereof is materially defective to the extent th defects would interfere with the continued use of such properties for the purposes for which t being used as of the date hereof and cannot be cured on or before Closing Date or if Kern's re tations as to value and bases of valuation, depreciation or amortization are materially incorrect, a defects or incorrect statements are not waived by Tenneco or KCL at such date or if such material and incorrect statements are of material adverse significance as to the stated value of Kern upo Tenneco has relied, then, at the election of KCL, such defects and incorrect statements may be co as a cause for termination of this Agreement and Plan of Reorganization, and the same may be so ter pursuant to the provisions of Article XIII hereof.

1.7 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule list of all automobiles, trucks, trailers, tandems, hoists, lifts and other rolling stock and all pla aeromotive equipment owned by or leased to Kern and its Consolidated Subsidiaries, Case and i solidated Subsidiaries and Case Credit. Such schedule does not include the inventory of rolling Case and its Subsidiaries manufactured for sale.

1.8 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule III of all the patents, trademarks, trade names, copyrights and applications (which may be revealed

the divulgence of trade secrets) for any thereof, domestic or foreign, owned by or registered in the name of Kern or any of its Subsidiaries or in which any thereof has any rights, other than rights arising under the agreements referred to and described in Schedule IV referred to in paragraph 1.9 hereof. Kern and each of its Subsidiaries owns or has licenses under such patents, trademarks, trade names and copyrights as they deem necessary to conduct their respective business as now operated by them and are not currently in receipt of any notice of conflict with the asserted rights of others in such patents, trademarks, trade names and copyrights nor are they or any of them in receipt of any notice of infringement or other complaint that its operations traverse or infringe the rights of patents, trademarks, trade names or copyrights of others. Schedule III identifies the ownership of such patents, trademarks, trade names, copyrights or applications for any thereof as between Kern and any of its Subsidiaries.

1.9 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule IV is a list of

(i) all licenses and grants of immunity from suit granted by others to Kern or any of its Subsidiaries, with respect to the production, manufacture or sale of any of the products thereof, and

(ii) all licenses granted by Kern or any of its Subsidiaries to others for the production, manufacture or sale of any product under any patent held or registered in the name of Kern or any of its Subsidiaries, or under any process or technical "know-how" which is the property of any such company.

Schedule IV identifies the Licensor and Licensee in each such license.

1.10 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule V is a brief description of all policies for fire, liability and other forms of insurance held by Kern and all of its Subsidiaries. Kern represents that such insurance coverage is adequate and is carried with reputable insurers and covers all properties usually insured by corporations engaged in the same or a similar business similarly situated against loss or damage of the kinds usually insured against by corporations engaged in the same or a similar business similarly situated.

1.11 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule VI is a list of the cash on hand and the bank accounts of Kern and each of its Subsidiaries, the amounts in each such bank account, all time deposits and other deposits (including, but not being limited to, utility deposits) and all notes, bonds, evidences of indebtedness, shares of stock (including the stock of all subsidiaries) and other securities owned by Kern or any of said companies, as shown by the books of each such company as of the close of business on April 30, 1967.

1.12 Except as listed in Schedule VII delivered by Kern to Tenneco and KCL concurrently herewith, neither Kern nor any of its Subsidiaries is a party to any written or oral

(i) contracts for the employment of any officer or individual employee which cannot be terminated within sixty days,

(ii) contracts with labor unions,

(iii) continuing contracts for the future purchase of materials, supplies or equipment in excess of the requirements for normal operating inventories or for business now booked,

(iv) continuing contracts for the future sale of products over a period of more than one year from the date hereof, except oil or gas sales contracts which are referred to in Schedule I,

(v) oil, gas or mineral leases or oil, gas or mineral development contracts or other arrangements to which Kern or any of its Subsidiaries is a party other than those referred to in Schedule I,

(vi) distributory or sales agreements,

(vii) pension, profit sharing, retirement or stock option or stock purchase plan in effect with respect to employees or others,

(viii) leases (other than oil, gas or mineral leases) in which it is lessor or lessee, other than those referred to in Schedule I,

(ix) consultant agreement, or

(x) any other significant contract not made in the ordinary course of business.

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Kern and each of the Consolidated Subsidiaries and (to the best of the knowledge of the offic Kern) Case and its Consolidated Subsidiaries and Case Credit have performed all obligations requi be performed respectively by them to date and are not in default in any material respect unde contract, indenture, agreement, lease or other writing to which they are a party or any oral agreem which they or any of them are bound.

1.13 Except as otherwise indicated in the relevant schedules, (a) all of the contracts refer in paragraph 1.12, (b) all of the policies of insurance referred to in paragraph 1.10, (c) all o licenses and grants of immunity referred to in paragraph 1.9, (d) all of the patents, trademarks, names, copyrights and applications therefor referred to in paragraph 1.5, and (e) all of the owne and interests in real property and investments referred to in Schedule I and the plants, structure improvements also referred to in Schedule I to which Kern is a party or in which Kern has a direct in and its stock ownership in all of its Subsidiaries are freely transferable by Kern to KCL (or will at Closing Date) pursuant to this Agreement and Plan of Reorganization.

1.14 Except as indicated in Schedule VIII delivered by Kern to Tenneco and KCL concurr herewith, there are no actions, suits, proceedings or investigations, whether or not purportedly on b of or against Kern or any of its Subsidiaries to the knowledge of Kern threatened against or affecting a such companies at law or in equity or admiralty or before or by any federal, state, municipal or other go mental department, commission, board, agency or instrumentality, domestic or foreign, which involve the lihood of any judgment or liability not fully covered by insurance without deductibles in excess of $100,0 any one case or $1,000,000 in the aggregate or which may result in any material, adverse change i business, properties or assets or in the condition, financial or otherwise, of any of such companies, no such company is, to the knowledge of any officer of Kern, in default with respect to any order, injunction or decree of any federal, state, municipal or other governmental department, commission, agency or instrumentality, domestic or foreign.

1.15 To the best of the information and belief of Kern's officers, Kern and each of its Subsidiarie complied in all material respects with all laws, rules, regulations and orders applicable to its business, certain disputes being pursued in good faith, described in a letter addressed and delivered by counsel for to Tenneco and KCL concurrently herewith.

1.16 All federal, state and other tax returns of Kern and its Subsidiaries required by law to be file been duly filed, and all federal, state and other taxes, assessments, fees and other governmental charges have been assessed against any such company or upon their respective properties or other assets and whi due and payable have been paid. All federal income tax returns of all such companies through 1960 hav audited by the Internal Revenue Service. Final agreement has been reached with the Internal R Service on the amount of Federal income tax due by all such companies except Case and its Subsidiaries years ending on or before December 31, 1960 and all amounts of Federal income tax due by Case and it sidiaries for all years ending on or before October 31, 1956. The amounts set up as provisions for taxes unaudited Balance Sheets of Kern and its Consolidated Subsidiaries, Case and its Consolidated S iaries and Case Credit dated April 30, 1967 are sufficient in each case for the payment of all accru unpaid federal, state, county and local taxes, including federal and state income taxes not yet cle appropriate examining authorities.

1.17 Except as indicated in Schedule IX delivered by Kern to Tenneco and KCL concurrentl with, since April 30, 1967, neither Kern nor any of its Subsidiaries has

(i) issued any stock or other corporate securities or granted any option to any employee other person, firm or corporation for the acquisition of any of its corporate securities,

(ii) incurred any obligation or liability (absolute or contingent), except current liabiliti obligations under contracts entered into in the ordinary course of business and except liabiliti expenses incurred in connection with or in anticipation of the execution and performance of tions under this Agreement and Plan of Reorganization,

(iii) discharged or satisfied any lien or encumbrance or paid any obligation or liability, or contingent, other than obligations or liabilities referred to in (ii) above and other than liens of t referred to in subparagraph (v) of this paragraph 1.17,

(iv) declared or made any payment or distribution to shareholders except (a) the declaration and payment by Kern of regular quarterly dividends on Kern's capital stock at the rate of 65¢ per share; and (b) the payment by Case of regular dividends on its two classes of preferred stock, nor has it purchased or redeemed any shares of its own capital stock,

(v) mortgaged, pledged or subjected to any lien, charge or other encumbrance any of their assets, tangible or intangible, other than (a) liens for taxes not yet due or which are being contested in good faith by appropriate proceedings; and (b) other liens, charges and encumbrances incident to the conduct of their businesses or the ownership of their property and assets which were not incurred in connection with the borrowing of money or the obtaining of advances or credit,

(vi) sold or transferred any of their tangible assets or cancelled any of the debts or claims due them, except in the ordinary course of business,

(vii) sold, assigned or transferred any patents, trademarks, trade names, copyrights or other intangible assets or licensed to third parties any such patent or patentable processes, except in the ordinary course of business,

(viii) suffered any extraordinary loss or waived any substantial right of value, or

(ix) entered into any transaction other than the transactions contemplated by this Agreement and Plan of Reorganization other than in the ordinary course of business.

1.18 Delivered by Kern to Tenneco and KCL concurrently herewith and marked Schedule X is Capital Expenditure Status Report of Kern and its Consolidated Subsidiaries summarizing capital projects which the Board of Directors of Kern has approved but which were not completed as of April 1967 and like Reports which the Board of Directors of Case has approved for Case and its Consolidated Subsidiaries and Case Credit. As of the anticipated Closing Date, the estimated cost of completion capital projects authorized for Kern and its Consolidated Subsidiaries, Case and its Consolidated Subsidiaries and Case Credit as of the date hereof and of any additional projects which have been budgeted and which may be authorized between the date hereof and the anticipated Closing Date will not exceed $25,000,000.

1.19 Since October 31, 1966, there have been no material changes in the business or condition, financial or otherwise, of (a) Kern and its Consolidated Subsidiaries as shown in the audited Balance Sheet of Kern and its Consolidated Subsidiaries as of such date, and (b) Case and its Consolidated Subsidiaries as shown in the audited Balance Sheet of Case and its Consolidated Subsidiaries as of such date, and (c) Case Credit as shown in its audited Balance Sheet as of that date, other than changes reflected in the April 30, 1967 Financial Statements included in Exhibit A and changes occurring in the ordinary course of business, which changes have not materially adversely affected their businesses, properties or financial conditions.

1.20 Except to the extent of the dollar value established for doubtful accounts, all of the accounts receivable of Kern and its Consolidated Subsidiaries, Case and its Consolidated Subsidiaries and Case Credit, all of the notes, accounts receivable and advances of Kern and its Consolidated Subsidiaries, Case and its Consolidated Subsidiaries and Case Credit shown on the unaudited balance sheets of such companies as of April 30, 1967, annexed hereto as a part of Exhibit A, or thereafter acquired prior to the date hereof have been collected or are collectible in the full book amounts thereof within the periods of time normal to the industries in which said companies operate. Tenneco will cause an audit to be conducted of the notes, accounts receivable and advances of said companies between the date hereof and Closing Date to verify the collectibility of such items and the accuracy of the representations contained in this paragraph 1.20. If such audit report shall conclude that such receivable items are not collectible substantially within the limits of the reserves for doubtful accounts, notes and accounts receivable provided for in the aforesaid balance sheets, plus such additions to the reserves for the doubtful accounts, notes and accounts receivable as are established prior to the Closing Date pursuant to the rate of increase consistently followed by such companies over the period of the past five years, then Tenneco or KCL at any time prior to the Closing Date may at their election, or at the election of either of them, give written notice to Kern of

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such audit report and this Agreement and Plan of Reorganization may be terminated pursuant to the provisions of Article XIII hereof.

1.21 The inventories of Kern and its Consolidated Subsidiaries shown on the unaudited balance sheet as of April 30, 1967, annexed hereto as a part of Exhibit A, or such inventories thereafter acquired or created prior to the date hereof are items of a quality and quantity, usable or salable in the normal course of business of Kern and its Consolidated Subsidiaries, and the values at which the inventories are carried reflect Kern's normal inventory valuation policy of stating inventory at the lower of cost or market, cost being determined generally by the first-in, first-out or specific identification methods. The inventories of Case and its Consolidated Subsidiaries and Case Credit as shown on their respective unaudited balance sheets as of April 30, 1967, annexed hereto as a part of Exhibit A, or inventories thereafter acquired prior to the date hereof, are likewise items of a quality and quantity, usable or salable in the normal course of their respective businesses, and the values at which their inventories are carried on their books reflect the normal inventory valuation policy of stating inventory at the lower of cost or market, cost being determined by the last-in, first-out method. Kern has delivered to Tenneco and KCL concurrently herewith Schedule XI which shows, as of April 30, 1967, the inventoryable items, and valuation thereof, of the products held for sale, raw materials and work in progress of Kern and each of its Subsidiaries, the aggregate value of which is stated on such Balance Sheets. Tenneco and KCL will cause an examination to be made by their representatives of the inventories of Kern and all of its Subsidiaries before the Closing Date, and if in the opinion of such representatives, the representations contained in this paragraph 1.21 are not substantially true and correct then Tenneco or KCL at any time prior to the Closing Date may at their election, or at the election of either of them, give written notice to Kern of such deficiency, specifying the nature thereof, and this Agreement and Plan of Reorganization may then be terminated by Tenneco or KCL pursuant to the provisions of Article XIII hereof.

1.22 The Board of Directors of Kern has duly approved this Plan of Reorganization and the transactions contemplated herein, subject to the approval hereof by the shareholders of Kern at a meeting to be held on July 17, 1967, and has authorized the execution and delivery hereof by Kern.

1.23 Neither Kern nor any of its Subsidiaries has entered into any agreement with any person, firm or corporation nor have they become indirectly a party to any agreement under which any other party has an option or a right to acquire by sale or exchange any portion of the properties and assets herein contracted to be sold except in the ordinary course of business as that term is hereinafter defined, and neither Kern nor any of its Subsidiaries has entered into any agreement with any person, firm or corporation or has become indirectly a party to any agreement for the payment of any commission, brokerage or "finders' fee" in connection with this Agreement and Plan of Reorganization and the proposed exchange of shares of Tenneco for all of the assets and properties of Kern.

1.24 The consummation of the transactions contemplated by this Agreement and Plan of Reorganization will not result in any breach of any of the terms, provisions or conditions of or constitute a default under the Articles of Incorporation, as amended, or By-laws of Kern or any of its Subsidiaries or any indenture, agreement or instrument to which Kern or any of its Subsidiaries is a party or by which any of them is bound and will not result in the creation of any lien, charge or encumbrance on any property or assets of Kern or its Subsidiaries; and the directors and officers of Kern do not know of any statute, rule, law or regulation which would (subject to the affirmative approval by the holders of a majority of the voting stock of Kern) inhibit the exchange contemplated hereby or the complete liquidation and dissolution of Kern.

1.25 Except for those contained in paragraphs 1.3, 1.4, 1.5, 1.15 and 1.19, the representations and warranties of Kern in this Article I hereof do not include or apply to Watkins-Johnson Company. With respect to that company, Kern represents and warrants that the statements contained in paragraphs 1.3, 1.4, 1.5, 1.15 and 1.19 insofar as they apply to Watkins-Johnson Company are true and correct. Kern also represents and warrants that the financial statements of Watkins-Johnson Company as reflected in the consolidated financial statements of Kern and its Consolidated Subsidiaries forming a part of Exhibit A attached hereto are correct, and that the officers of Kern do not know of any matter occurring since the date of such financial statements which might have materially changed or adversely affected the business, affairs or financial condition of Watkins-Johnson Company.

ARTICLE II

Representations and Warranties of Tenneco and KCL

2.1 Each, Tenneco and KCL, has been duly organized and each is a validly existing corporation in good standing under the laws of the State of Delaware and Tenneco is in good standing as a foreign corporation in all the other states and other jurisdictions in which it is qualified to do business.

2.2 KCL is and at the Closing Date will be a wholly owned subsidiary of Tenneco, is qualified to do business as a foreign corporation in California, and at Closing Date will be qualified to do business as a foreign corporation in all jurisdictions where Kern is qualified.

2.3 The Balance Sheets as of December 31, 1966 and the related Statements of Income, Retained Earnings and Premium on Capital Stock and other Capital Surplus of Tenneco and Subsidiary Companies for the three years ended December 31, 1966 and the Summary of Consolidated Earnings of Tenneco and its Subsidiaries for the five years ended December 31, 1962, 1963, 1964, 1965 and 1966, all certified by Arthur Andersen & Co. as set forth in the Prospectus constituting a part of the Registration Statement (Reg. No. 2-26360) under the Securities Act of 1933, as amended, fairly present the financial condition of Tenneco and its Subsidiaries as of December 31, 1966 and the results of their operations for the respective periods of said statements. All such statements have been prepared in conformity with generally accepted accounting principles consistently applied except as otherwise stated in the notes to such statements.

2.4 Since December 31, 1966 there has been no material adverse change in the business or condition, financial or otherwise, of Tenneco and its Subsidiary Companies as shown in the balance sheet as of December 31, 1966 referred to in paragraph 2.4 hereof other than changes occurring in the ordinary course of business and the transactions referred to in Schedule A delivered by Tenneco concurrently herewith to Kern, which changes and transactions have not had any material adverse effect upon its business properties or financial condition.

2.5 The capital stock of Tenneco as of March 31, 1967 was as follows:

Class of Stock	Originally Authorized	Issued and Outstanding
Preferred Stock		
Par value $100 per share.....	2,700,000 shares	1,380,420 shares
Second Preferred Stock		
Par value $100 per share.....	2,000,000 shares	1,958,358 shares
Common Stock		
Par value $5 per share.....	60,000,000 shares	50,470,503 shares

Since said date there have been no changes in the number of shares of any such classes of stock outstanding except as the result of the exercise of stock options and conversion privileges and as a result of the transactions whereby Tenneco acquired the assets and properties of General Foam Corporation.

Tenneco shareholders at a meeting to be held on July 11, 1967 will be asked to amend the Certificate of Incorporation of Tenneco so as to authorize the creation of the Preference Stock with provision for issuance of the Tenneco $5.50 Cumulative Convertible Preference stock referred to in paragraph 6.3 hereof and to further authorize an additional 40,000,000 shares of Tenneco Common Stock, par value $5.00 per share.

2.6 The Boards of Directors of Tenneco and KCL have each duly approved this Agreement and Plan of Reorganization and the transactions contemplated herein and have authorized the execution and delivery hereof by their respective officers, subject to shareholders' approval. Tenneco as the sole shareholder of KCL has approved this Agreement and Plan of Reorganization.

2.7 The consummation of the transactions contemplated by this Agreement and Plan of Reorganization will not result in the breach of any of the terms or conditions of, or constitute a default under the Certificate of Incorporation or By-laws of Tenneco or KCL as amended or any indenture, agreement or instrument to which either of them is a party or by which either is bound, and will not result in the creation of any lien, charge or encumbrance on any property or assets of either of them; and the directors and officers of Tenneco and KCL do not know of any statute, rule, law or regulation which would inhibit the exchange contemplated hereby, subject to Tenneco shareholders' approval.

2.8 The copy of the Certificate of Incorporation, Certificate of Amendments thereto, Certificates of Retirement of Preferred Stock, Certificates of Designation, Certificates of Incorporation and By-laws of Tenneco

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and Certificate of Incorporation and By-laws of KCL which have been delivered by Tenneco and KCL to Kern are true, correct and complete copies of such certificates and By-laws as amended and existing at the date of this Agreement and Plan of Reorganization. The copies attached hereto as Exhibits C and D, respectively, of the proposed Certificate of Amendment to the Certificate of Incorporation and the proposed Certificate of Designation of Tenneco which will be filed with the Secretary of State of the State of Delaware following the affirmative action of Tenneco's shareholders on July 11, 1967, are true, correct and complete copies of such Certificates.

2.9 The Prospectus dated May 1, 1967 constituting a part of the Registration Statement of Tenneco (Registration No. 2-26360) under the Securities Act of 1933, copies of which have been furnished to Kern, contained no untrue statement of a material fact and did not fail to state any material fact required to be stated therein or necessary to make the statements therein not misleading. Since May 1, 1967 there has been no material adverse change in the business, affairs, financial conditions or earnings of Tenneco and its Subsidiaries and all information furnished by Tenneco to Kern for inclusion in Kern's proxy statement to be mailed to Kern's stockholders in conjunction with the special meeting of Kern stockholders to be held on July 17, 1967 is true and correct to the best of the knowledge and belief of Tenneco's directors and officers.

2.10 Tenneco and each of its Subsidiaries have performed in all material respects the obligations required to be performed by them to date and are not in default in any material respect under any contract, indenture, agreement, lease or other document to which they are a party or by which they are bound.

2.11 Except as indicated in the schedule marked Schedule A which Tenneco has heretofore delivered to Kern, there are no actions, suits, proceedings or investigations (whether or not purportedly on behalf of or against Tenneco) pending or to the knowledge of Tenneco threatened against or affecting Tenneco or any of its Subsidiaries in law or in equity or admiralty or before or by any federal, state, municipal or other governmental department, commission, board, agency or instrumentality, domestic or foreign, which involve the likelihood of any judgment or liability, not fully covered by insurance, without deductibles, in excess of $100,000 in any one case or $2,000,000 in the aggregate or which may result in any adverse change in the business, properties or assets or in the condition, financial or otherwise of Tenneco and its Subsidiaries; and neither Tenneco nor any of its Subsidiaries is, to the knowledge of any officer of Tenneco in default with respect to any order, writ, injunction or decree of any federal, state, municipal or other governmental department, commission, board, agency or instrumentality, domestic or foreign.

2.12 To the best of the knowledge, information and belief of its officers, Tenneco and each of its Subsidiaries has complied in all material respects with all laws, rules, regulations, and orders applicable to its business.

2.13 All federal, state and other tax returns of Tenneco and its Subsidiaries required by law to be filed have been duly filed, and all federal, state and other taxes, assessments, fees and other governmental charges which have been assessed against any such company or its properties or assets and which are due and payable have been paid. All federal income tax returns of all such companies through 1963 have been audited or cleared by the Internal Revenue Service. The amounts set up as provisions for taxes on the December 31, 1966 Balance Sheets of Tenneco and its Subsidiaries mentioned in paragraph 2.4 hereof are sufficient for the payment of all accrued and unpaid federal, state, county and local taxes.

ARTICLE III

Ordinary Course of Business

3.1 Kern represents that during the period from October 31, 1966 to the date hereof Kern and its Subsidiaries have conducted and Kern agrees that from the date hereof to the Closing Date (except for this Plan of Reorganization and transactions contemplated hereby) they will conduct their respective businesses and affairs only in their ordinary course or as may be expressly agreed to on behalf of Tenneco and KCL by Mr. W. E. Scott, member of the Board of Directors of Tenneco, or any other person duly authorized by him or by Tenneco and KCL in writing. During the period from the date hereof to the Closing Date, Kern will not knowingly take or allow any Subsidiary to take any action which would materially change the conduct of their businesses and affairs from the manner in which said businesses and affairs were conducted from October 31, 1966 to

the date of this Agreement and Plan of Reorganization, except for the declaration and payment of regular dividends. For the purpose of this Agreement and Plan of Reorganization the phrase "ordinary course of business" shall mean the conduct and operation of the business of Kern and its Subsidiaries in owning, leasing and operating its ranch, farm, real estate, and oil properties, producing and marketing farm products and cattle, producing and refining petroleum and gas, manufacturing, processing and marketing through its subsidiaries the types of products which such subsidiaries manufactured, processed and sold during a period of one year preceding the date hereof, and engaging in research and development programs contemplated within the scope of their respective budgets for the year 1967, following their usual and ordinary accounting practices, making ordinary accruals and ordinary expenditures for merchandise, insurance, rentals, and making ordinary contract commitments, all other ordinary expenses and such capital expenditures for projects contemplated by Kern's fixed capital expenditure budget for the year 1967 heretofore furnished by Kern to Tenneco and KCL.

ARTICLE IV

Access to Properties, Books, Records and Accounts

4.1 From and after the date of this Agreement and Plan of Reorganization until Closing Date, Kern will

(i) give to Tenneco and KCL and their respective representatives and counsel full access at any reasonable time to all of the properties and allow consultations with all of the personnel of Kern and examination of all of Kern's and its Subsidiaries' books, records, tax returns, contracts and documents relating to its properties and assets for any purpose, including the right to reproduce all or any part thereof and to make inventories thereof,

(ii) arrange with the management of Case for representatives of Tenneco to have similar access to the properties, books and records of Case and Case Credit,

(iii) furnish to Tenneco and KCL all information with respect to the business, affairs and properties of Kern and its Subsidiaries as Tenneco and KCL may from time to time request,

(iv) permit Tenneco and KCL to arrange for a review to be made of Kern's affairs and books of account by independent certified public accountants of Tenneco's choice, and arrange for Kern's independent certified public accountants, Haskins & Sells, to allow representatives of Tenneco and its independent public accountants access to Haskins & Sells' working papers covering the Kern, Case and Case Credit accounts,

(v) allow Tenneco and KCL, their agents and nominees, to have access to the title papers, records, contract and property files of Kern and its Subsidiaries and to all of Kern's and its Subsidiaries' patents, copyrights, trade names, trademarks and applications therefor and all files pertaining thereto in any of its offices or in any patent office where filed

in order that its representatives and counsel may determine if Kern or its Subsidiaries own and hold good and merchantable title to the properties and assets listed on the books and records of Kern and its Subsidiaries as of April 30, 1967, the date hereof and on the Closing Date, and may determine the accuracy of Kern's representations and the observance by Kern of its covenants as contained in Articles I, V and VIII hereof. The word "Subsidiaries" in this paragraph 4.1 does not include Watkins-Johnson Company.

4.2 Kern agrees to furnish KCL at Closing Date and at KCL's expense policies of title insurance on such of the parcels of real property claimed to be owned by Kern and its Subsidiaries as KCL may request. Kern agrees that it will (a) make every reasonably good faith effort to correct or cure any defects in the titles to the real properties of Kern and its Subsidiaries which may be requested by KCL and (b) not make any expenditure or incur any expense for the purpose of eliminating any such defects without obtaining the prior consent of KCL. If on the Closing Date there shall exist defects in the title to any substantial portion of the real properties of KCL which would interfere with the continued use of such properties for the purposes that they are presently being used, or if there is a defect involving a property or properties of such a nature as to make it unmerchantable the value of which exceeds $500,000, or if the bases of valuation as represented by Kern in paragraph 1.6 hereof is untrue in any materially significant respect, such defects, if not waived by KCL prior to the Closing Date, shall constitute a cause for termination of this Agreement and Plan of Reorganization under Article XIII hereof.

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4.3 Tenneco and KCL shall arrange for its independent public accountants to make available to Kern and its agents or nominees all working papers and records concerning their examination of Tenneco's financial statements to and including December 31, 1966 and interim working papers and records from said date to Closing Date and Kern shall have the right to arrange with its certified public accountants, Haskins & Sells, for consultation with Tenneco's public accountants at such times as may be mutually convenient to such accounting firms for such discussions as Kern may consider to be desirable or necessary.

4.4 From and after the date of this Agreement and Plan of Reorganization, Tenneco and KCL will

(i) give to Kern and its representatives and counsel full access at any reasonable time to all of the properties and books, records, tax returns, contracts and documents relating to its properties and assets for any purpose incident to this Agreement and Plan of Reorganization, including the right to reproduce all or any portion thereof and to make inventories thereof,

(ii) furnish to Kern all information with respect to the business, affairs and properties of Tenneco and its Subsidiaries and KCL as Kern may from time to time request, and

(iii) permit Kern to review or cause a review to be made of all of the affairs of Tenneco and its Subsidiaries.

ARTICLE V

Covenants of Kern

5.1 Kern covenants that from and after the date hereof and through Closing Date, it will

(i) not declare or pay any dividend or make any distribution to the holders of its capital stock, except regular quarterly dividends of 65¢ each per share upon its issued and outstanding capital stock,

(ii) not make any changes in its Articles of Incorporation or By-laws, or allow any changes in the Articles of Incorporation of Case and its Subsidiaries or Case Credit,

(iii) not grant further stock options nor allow employees to purchase shares of capital stock of Kern, except on the open market or pursuant to Kern's Employee Investment and Profit Sharing Plan, or Kern's stock options heretofore granted,

(iv) not increase from and after the date hereof the rate or form of compensation payable to any officer or employee of Kern and its Subsidiaries, except increases in salaries and other form of compensation occasioned by collective bargaining under any labor contract or agreement or as may have been in the ordinary course of salary adjustments or as may be agreed upon by Tenneco,

(v) not dispose of any of its properties or assets, except in the ordinary course of Kern's business and the business of its Subsidiaries,

(vi) not incur any indebtedness, except in the ordinary course of business nor take or fail to take any action which would cause any material adverse change to be made in the financial affairs of Kern or its Subsidiaries; nor extend any tax or other liability of Kern or its Subsidiaries by waiver of statutes of limitation without the prior written consent of Tenneco,

(vii) not execute any oil, gas and mineral leases (except those under negotiation at the date hereof) covering any of the properties of Kern and its Subsidiaries without the prior written consent of Tenneco,

(viii) use its best efforts in the solicitation of proxies to be voted at the special meeting of shareholders of Kern to be held on July 17, 1967 so as to obtain a majority vote of all of the Capital Stock of Kern and approval of the terms and provisions of this Agreement and Plan of Reorganization, including the hiring of any and all professional proxy solicitors and public relations counsel as may be necessary,

(ix) comply in all material respects with all applicable local state and federal rules, laws, regulations and orders, including those relative to the payment of income, franchise and other taxes, fees, imposts and charges due to be paid prior to the Closing Date,

(x) grant to Tenneco and KCL the full and free access to books, records, properties and personnel as referred to in Article 4 hereof,

(xi) obtain such written consents or take such measures and actions as may be appropriate to cause to be made freely transferable to KCL, pursuant to the terms of this Agreement and Plan of Reorganization, all of the properties and assets of Kern and the stock interest it owns in its Subsidiaries, and

(xii) pay the costs and expenses incurred by it in effectuating and carrying out this Agreement and Plan of Reorganization, including but not limited to the fees and expenses of its counsel and accountants, printing and mailing costs with reference to its solicitation of proxies for the meeting of its shareholders to be held on July 17, 1967 and the cost of documentary and transfer stamps required on the transfer of any properties; and after Closing Date Kern will retain in a separate bank account established specifically for such purpose cash in the amount of $500,000 to pay all of such costs and expenses as shall not have been paid on or prior to Closing Date and the costs and expenses of the delisting of its Capital Stock on the New York and Pacific Coast Stock Exchanges and the costs and expenses of completely liquidating Kern pursuant to the Corporations Code of the State of California, it being agreed by Kern that such cash shall be used only to pay such costs and expenses and any balance thereof remaining at the expiration of one hundred twenty days (120) days following Closing Date shall be paid over to KCL.

5.2 The word "Subsidiaries" in paragraph 5.1 hereof does not include Watkins-Johnson Company. Kern agrees promptly to bring to the attention of Tenneco and KCL any matter which might come to Kern's attention between the date hereof and Closing Date which might materially change or adversely affect the business, affairs or financial condition of Watkins-Johnson.

ARTICLE VI

Covenants of Tenneco

6.1 Tenneco covenants that from and after the date hereof and through Closing Date, it will

(i) cause a special meeting of its shareholders to be held at Houston, Texas on July 11, 1967 for the purposes of amending its Articles of Incorporation so as to authorize the issuance of the class of securities to be issued to Kern pursuant to this Agreement and Plan of Reorganization and to authorize the increase in the number of shares of its common stock from 60,000,000 to 100,000,000,

(ii) not take any action which will change in any material respect the nature of its business, except the merger of its Subsidiary Tennessee Life Insurance Company into Philadelphia Life Insurance Company,

(iii) not authorize or make any split up of its common stock or any change in the rights of the holders of its preferred and second preferred stock or create any class of preference stock other than the $5.50 Cumulative Convertible Preference Stock referred to herein,

(iv) not declare or pay any dividend or make any other distribution to the holders of its common stock, except the regular quarterly dividends of 30¢ each per share on its common stock and not pay any dividends on its present classes of preferred stock except those regularly provided for, and

(v) grant to Kern the full and free access to the books, records, properties and personnel as referred to in Article 4 hereof.

6.2 Tenneco covenants that it will cause KCL to be qualified to do business and be in goood standing as a foreign corporation in each of the jurisdictions in which Kern is qualified as of the Closing Date.

6.3 Tenneco covenants that: The shares of stock of Tenneco to be exchanged hereunder for all of the properties and assets of Kern contracted to be acquired hereunder are shares of $5.50 Cumulative Convertible Preference Stock entitled to one vote per share and such stock, at Closing Date, will have been validly authorized by the Certificate of Incorporation of Tenneco, as amended, pursuant to action of its shareholders at a shareholders' meeting to be held on July 11, 1967 and the issuance thereof will have been validly authorized by appropriate action of the Board of Directors of Tenneco and such stock when issued pursuant hereto will be validly issued and will be fully paid and non-assessable. Such stock will be listed on the New York and Pacific Coast Stock Exchanges no later than December 31, 1967, if the Closing Date shall occur on or before December 1, 1967, and no later than 30 days after the Closing Date if that date shall occur after Decem-

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ber 1, 1967. Such stock shall be delivered free and clear of all liens and encumbrances to Kern for distribution to its shareholders, and such stock, when received by the shareholders of Kern, will be freely transferable stock under the Securities Act of 1933 subject only to such conditions or limitations as may be required by counsel for Tenneco and approved by Kern, which approval shall not be unreasonably withheld. At the Closing Date Tenneco, pursuant to action of its shareholders at a shareholders' meeting to be held on July 11, 1967, will have authorized the issuance of a total of 100,000,000 shares of common stock of the par value of $5.00 per share. The $5.50 Cumulative Convertible Preference Stock herein referred to will be convertible into 3.6 shares of Tenneco Common Stock from and after July 1, 1969 and such $5.50 Cumulative Convertible Preference Stock will not be callable by Tenneco for a period of ten (10) years from and after July 1, 1967, and thereafter will be callable at $110 per share decreasing $1 each year to $100. The rights, privileges and preferences of the Preference Stock of Tenneco are described in Exhibits B, C and D attached hereto and made a part hereof consisting, respectively, of a "Description of Tenneco $5.50 Cumulative Convertible Preference Stock", a copy of the proposed Certificate of Amendment of Certificate of Incorporation of Tenneco, and a copy of the proposed Certificate of Designation, Preferences and Rights of Preference Stock by Resolution of the Board of Directors of Tenneco.

ARTICLE VII

Covenants of Kern, Tenneco and KCL

7.1 Except for the sum of money to be reserved by Kern for winding up its affairs and distributing the shares of Tenneco $5.50 Cumulative Convertible Preference Stock to the shareholders of Kern, Kern hereby agrees to convey, transfer, assign and deliver to KCL and KCL agrees to acquire and accept from Kern, as herein provided, on the Closing Date all of the assets and properties, business and goodwill of Kern of every kind and description, whether or not described in Article I of this Agreement and Plan of Reorganization or any schedule therein referred to or any schedule delivered in substitution for any thereof, including without limitation all properties, tangible or intangible, real, personal or mixed, accounts receivable, bank accounts, choses in action, claims, cash and all securities, including Kern's stock ownership in all of its Subsidiaries (whether standing in the name of Kern or a nominee) but excluding shares of Kern capital stock held in Kern's treasury, claims and rights under contracts of Kern, right to use the name "Kern County Land Company" and the copyrights, symbols and slogans incident to such name and all other names and all trade names, trademarks and slogans used by it in connection with its businesses or products and all books and records of Kern relative to its business, all as the same shall exist at Closing Date. The assets and properties to be conveyed, transferred, assigned and delivered on the Closing Date shall include without limitation all assets and properties of Kern shown on the unaudited Consolidated Balance Sheet of Kern as of April 30, 1967 annexed hereto as a part of Exhibit A, and all assets and properties thereafter acquired by Kern prior to the Closing Date, except such of those assets as may have been disposed of prior to the Closing Date in the ordinary course of business or in the payment and discharge of its liabilities on or prior to the Closing Date.

7.2 From and after the Closing Date, KCL shall assume and agrees to pay, perform and discharge all debts, obligations, contracts and liabilities of Kern of every kind, character and description, whether accrued, absolute, contingent or otherwise, all as the same shall exist at the Closing Date and any expenses thereafter incurred by Kern in connection with its final liquidation and dissolution not provided for in paragraph 5.1(xii); provided, however, that nothing contained in this paragraph 7.2 shall relieve Kern of its obligation under this Agreement and Plan of Reorganization to distribute the shares of Tenneco $5.50 Cumulative Convertible Preference Stock to the holders of Kern's capital stock in the ratio of one share of such Tenneco stock for each full share of the Kern capital stock, all in the complete winding up and liquidation of Kern.

7.3 Kern agrees that it will at any time and from time to time after the Closing Date upon request of KCL, but at KCL's expense, do, execute, acknowledge and deliver all such other and further acts, deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be required for the better assigning, transferring, granting, conveying, assuring and confirming to KCL or its successors and assigns, or for aiding and assisting in collecting and reducing to possession any of the properties and assets to be assigned as provided in this Agreement and Plan of Reorganization. Kern also agrees that it will convey, transfer, assign and deliver to KCL all properties, claims, choses in action, rights, and other assets which Kern may

acquire or to which it may become entitled on or after the Closing Date other than the shares of Tenneco $5.50 Cumulative Convertible Preference Stock to be delivered to Kern pursuant to this Agreement and Plan of Reorganization.

7.4 On the terms and subject to the conditions herein set forth, Tenneco will cause KCL to deliver, and KCL will deliver, to Kern on the Closing Date definitive stock certificates for an aggregate number of shares of $5.50 Cumulative Convertible Preference Stock of Tenneco equal to the aggregate number of shares of capital stock of Kern which shall be issued and outstanding on the Closing Date. Such Tenneco stock certificates shall be registered in such names and shall represent such respective numbers of shares as Kern shall specify in writing to Tenneco. Promptly after receipt by Kern of the Tenneco stock certificates, it shall distribute or cause to be distributed by its exchange agent all of the shares represented by such certificates to the holders of its capital stock in complete winding up and liquidation of Kern and will not otherwise dispose of any of such shares. Delivery of such shares shall be made against surrender by the shareholders of Kern of their respective Kern stock certificates on a share-for-share basis for each issued and outstanding share of Kern, exclusive of any shares held by Kern in its treasury, which shares shall be cancelled by Kern at or immediately after the Closing Date. Such distribution shall be effected by Wells Fargo Bank, San Francisco, California, to which Kern shall deliver the certificates of shares of Tenneco's $5.50 Cumulative Convertible Preference Stock received by Kern at Closing Date with irrevocable instructions with reference to the distribution thereof, which instructions shall have Tenneco's approval.

7.5 Additionally, Tenneco will hold for issuance an additional number of shares of its $5.50 Cumulative Convertible Preference Stock for issuance to the holders of stock options of Kern now outstanding and will, upon the exercise of such option rights, or the rights of holders of options granted by Tenneco of equal value with and in substitution for the Kern options, deliver to such optionees the shares of Tenneco's $5.50 Cumulative Convertible Preference Stock upon the payment therefor by such optionees.

7.6 Tenneco does not issue fractional shares of its Common Stock and therefore from and after July 1, 1969 upon the conversion of any shares of $5.50 Cumulative Convertible Preference Stock which may be converted into Tenneco Common Stock, such converting shareholder will be entitled to receive Common Stock of Tenneco to the nearest full share and cash for any fractional share to which he might otherwise be entitled, based on the closing sales price on the principal stock exchange upon which the stock is listed on the last full business day of the week preceding the week in which such conversion is effected.

7.7 At Closing Date (upon request of Tenneco) Kern shall amend its Articles of Incorporation so as to change its name to "600 California Corporation," and KCL may thereupon change its name, by amendment of its Certificate of Incorporation, to "Kern County Land Company".

7.8 As soon as practicable after the Closing Date, Kern in its new name will take such steps as may be required under the laws of the State of California to dissolve and terminate its corporate existence, except to the extent that under such laws its corporate existence may continue for the purpose of settling and winding up its affairs and shall take all action in addition to the action specifically referred to above that may be necessary or appropriate in order to distribute to its shareholders certificates for shares of the $5.50 Cumulative Convertible Preference Stock of Tenneco pursuant hereto.

7.9 The closing under this Agreement and Plan of Reorganization shall take place at the offices of Kern, 600 California Street, San Francisco, California on such date not earlier than September 30, 1967 and not later than December 31, 1967 as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon. The time and date of the closing is referred to throughout this Agreement as the "Closing Date".

7.10 KCL hereby waives compliance by Kern with the provisions of the Bulk Sales Law of any state.

7.11 Tenneco and KCL shall bear and pay the costs of all federal and state original issue and transfer taxes due in respect of the issue and transfer to the shareholders of Kern of the shares of Tenneco $5.50 Cumulative Convertible Preference Stock and the sales taxes which may be imposed upon KCL by virtue of the sale and transfer to it of any of the assets and properties of Kern; and Kern shall bear and pay the documentary taxes applicable to the transfer by it to KCL of any of the realty herein contracted to be sold and other taxes applicable to the transfer of other classes of properties hereby contracted to be sold.

ARTICLE VIII

Conditions Precedent to the Exchange by KCL

8.1 The obligations of KCL and Tenneco to consummate this Agreement and Plan of Reorganization and to exchange the shares of Tenneco $5.50 Cumulative Convertible Preference Stock for the properties and assets of Kern shall be subject to and conditioned upon each of the following conditions:

(i) On or before June 6, 1967 the Board of Directors of Kern shall adopt a resolution recommending to its shareholders the exchange of all of Kern's properties and assets for the shares of Tenneco $5.50 Cumulative Convertible Preference stock, the final liquidation and dissolution of Kern, and (at the request of Tenneco) the change of Kern's name as soon as practicable after the Closing Date to "600 California Corporation," all as provided for in this Agreement and Plan of Reorganization, and directing the submission of such recommendations to a vote at the meeting of Kern shareholders called for such purposes.

(ii) A special meeting of the shareholders of Kern shall be called for the purposes set forth in paragraph 8.1(i) above, no later than July 17, 1967; and the approval of this Agreement and Plan of Reorganization shall require the affirmative vote of the holders of at least a majority of the validly issued and outstanding shares of stock of Kern, exclusive of treasury shares.

(iii) Properties or physical assets of Kern or any of its Subsidiaries shall not have suffered any destruction or damage by fire, explosion, or other calamity not covered by insurance exceeding the aggregate value of $200,000.

(iv) The representations and warranties of Kern made in Article I hereof shall be true and correct in all material respects on and as of the Closing Date with the same force and effect (except as affected by the transactions contemplated herein or any unusual transactions approved in writing by Tenneco and KCL and changes occurring after the date hereof in the ordinary course of business) as though such representations and warranties had been made on the Closing Date; none of the covenants of Kern contained in Articles V and VII hereof shall have been breached in any material respect as of the Closing Date and Kern shall have delivered to Tenneco and KCL a certificate to such effect signed by the President and Treasurer of Kern.

(v) Tenneco and KCL shall have received on the Closing Date a certificate of the President, Secretary and Treasurer of Kern that since the date of the Balance Sheet of Kern and its Consolidated Subsidiaries dated as of April 30, 1967 and annexed hereto as a part of Exhibit A there has been no material adverse change in the condition, financial or otherwise, of Kern or any of its Consolidated Subsidiaries from that set forth in said balance sheet and that there have been no material adverse changes in the condition, financial or otherwise, of Case and its Consolidated Subsidiaries and Case Credit subsequent to the date of their Balance Sheets as of April 30, 1967, other than changes brought about through transactions in the ordinary course of business.

(vi) Kern shall have delivered to Tenneco and KCL the following letters or certificates addressed to Tenneco and KCL:

A. The letter of Haskins & Sells that such firm has reviewed the several federal income tax returns of Kern and its Subsidiaries for all fiscal years ended after December 31, 1960, except the returns of Case and its Subsidiaries for fiscal years ended on or before October 31, 1964, and that in the opinion of such firm Kern and its Subsidiaries have paid or set up adequate reserves for the payment of all federal income taxes for such fiscal years after allowing for future tax benefits, and that such firm has no information which indicates that the representations of Kern contained in paragraph 1.16 hereof with respect to such fiscal years are not true on and as of a date not more than seven (7) days prior to the Closing Date.

B. The letter of Price Waterhouse & Co. that such firm has reviewed the several federal income tax returns of Case and its Subsidiaries for all fiscal years ended after October 31, 1956 and on or before October 31, 1964, and that in the opinion of such firm Case and its Subsidiaries have paid or set up adequate reserves for the payment of all federal income taxes for such fiscal years after allowing for future tax benefits, and that such firm has no information which indicates

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that the representations of Kern contained in paragraph 1.16 hereof with respect to Case and its Subsidiaries as to such fiscal years are not true on and as of a date not more than seven (7) days prior to the Closing Date.

C. The certificate of Norman S. Angell and John J. Hartmann, Treasurer and Vice President, respectively, of Kern, stating that to the best of their knowledge all other taxes have been duly paid or adequately provided for in the financial statements comprising Exhibit A hereto.

D. The letter of Haskins & Sells that such firm has read the unaudited consolidated balance sheets and related unaudited statements of consolidated income of Kern and its Subsidiaries as of April 30, 1967 and for the six months then ended included as a part of Exhibit A to this Agreement and Plan of Reorganization and has made inquiries of the responsible officers of Kern and its Subsidiaries, Case, Case Credit, Watkins-Johnson Company and Walker Manufacturing Company and that such reading and inquiries did not cause them to believe, nor did anything else cause them to believe that such statements are not fair presentations of the information they purport to show.

(vii) On or before the Closing Date Kern shall have obtained such written consents or taken such other measures as may have been appropriate to make or cause to be made freely transferable to KCL pursuant to this Agreement and Plan of Reorganization all of the properties and assets herein contracted to be transferred by Kern to KCL, except items of property and assets which do not in the aggregate constitute a substantial or material portion of the properties and assets of Kern at the Closing Date, which are not freely transferable hereunder at the Closing Date despite the exertion of diligent efforts of Kern to make them so, and as to which Kern shall have agreed with Tenneco and KCL at the Closing Date that Kern will continue to exercise diligent efforts after the Closing Date to make such items of property and assets freely transferable hereunder, or, in the alternative, to make such other arrangements by way of lease, sublease, contract or otherwise as may be necessary and appropriate to permit KCL to have and enjoy the rights, benefits and privileges thereof in such manner and to such extent as shall be as nearly equivalent to the ownership thereof as may be possible and lawful under the circumstances.

(viii) At the Closing Date no holder of any shares of capital stock of Kern or Tenneco shall have enjoined the carrying out of this Agreement and Plan of Reorganization or shall have instituted or threatened to institute any proceeding to recover from Kern or any of its officers or directors damages alleged to arise out of this Agreement and Plan of Reorganization or any of the transactions contemplated hereby unless in the judgment of the management of Tenneco such instituted or threatened proceeding is of such a nature as to have no materially adverse effect upon the value of the assets, properties and goodwill to be transferred hereunder.

(ix) At the Closing Date no action or proceeding shall have been instituted or undertaken by any governmental agency, department, bureau, or division in any court in which it is sought to restrain or prohibit the consummation of the transactions contemplated hereunder.

(x) All actions, proceedings, instruments and documents required to carry out this Agreement and Plan of Reorganization or incidental thereto and all other related legal matters shall have been approved in writing by counsel for Kern, Tenneco and KCL.

(xi) Case shall not since the date of this Agreement and Plan of Reorganization have declared or paid any dividend or made any distribution to the holders of its common stock or paid any dividends other than the regular quarterly dividends on the two classes of its preferred stock.

(xii) The precentage of Kern's ownership of the outstanding stock of its subsidiaries and of its interests and investments in other companies and projects described in Schedule I shall not have been substantially diluted or diminished.

(xiii) KCL shall have received:

A. The opinion of McCutchen, Doyle, Brown & Enersen, counsel for Kern, dated the Closing Date and in form and in substance satisfactory to KCL to the effect that:

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(a) Kern is a corporation duly organized and existing and in good standing under the laws of the State of California and has qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which it does business.

(b) Each of the subsidiaries is incorporated under the laws of the jurisdiction of its incorporation, and is validly existing and in good standing under the laws of such jurisdiction and is qualified to do business and in good standing as a foreign corporation in all other jurisdictions in which it does business, such opinion with respect to Subsidiaries not incorporated in California and with respect to Watkins-Johnson Company being based upon opinions of counsel for such respective Subsidiaries.

(c) Such counsel do not know of any material pending litigation to which Kern or any of its Subsidiaries is a party defendant other than the litigation disclosed in Schedule VIII which has been delivered to Tenneco and KCL or any material threatened litigation against Kern or any such subsidiary which would materially adversely affect the properties and business of Kern and such subsidiaries.

(d) Kern has full power and authority to convey, assign, transfer and deliver to KCL the assets and properties, business and good will as herein provided except as to such thereof as such counsel may have had brought to their attention which are not freely transferable and which such counsel shall have pointed out to Tenneco and KCL.

(e) All corporate and other proceedings required to be taken by or on the part of Kern to authorize it to carry out this Agreement and Plan of Reorganization and so to convey, assign and transfer their properties, business and good will to KCL have been duly and properly taken.

(f) The vote of the shareholders of Kern taken at the meeting held on July 17, 1967 will operate to authorize on behalf of Kern the conveyance, transfer, assignment and delivery of the assets, properties, business and good will of Kern in exchange for the $5.50 Cumulative Convertible Preference Stock of Tenneco upon the terms and conditions provided herein and to bind the shareholders of Kern thereto without any right of appraisal or right of payment in cash in lieu of the delivery of Tenneco Preference Stock.

(g) To the best of the knowledge of such counsel, the representations and warranties of Kern contained in this Agreement and Plan of Reorganization are true and correct in all material respects, the covenants to be observed and performed by Kern hereunder have been performed and none thereof has been breached and the conditions precedent to the closing of the transactions contemplated hereby have all been performed or met by Kern or have been waived in writing by Tenneco or KCL.

B. Upon request made by Tenneco and KCL in writing prior to August 20, 1967 Kern will deliver the opinion of competent patent counsel of Tenneco's choice to the effect that Kern and Kern's Subsidiaries have valid title to all of the patents, domestic or foreign, patent applications, trademarks, trade names and copyrights listed in Schedule 3 delivered to KCL pursuant to paragraph 1.8 hereof and the further opinion of such patent counsel as to the validity of any such patent, patent application, or trademark, trade name and copyright which may now or at any time prior to the Closing Date be disputed or contested in good faith.

C. The opinion of McCutchen, Doyle, Brown & Enersen to the effect that the tax ruling requested by Kern and Tenneco pursuant to Article X hereof is in substance and in form satisfactory to Kern.

ARTICLE IX

Conditions Precedent to the Exchange by Kern

9.1 The obligations of Kern to consummate this Agreement and Plan of Reorganization and to exchange its properties and assets, business and good will for shares of Tenneco $5.50 Cumulative Convertible Preference Stock shall be subject to and shall be conditioned upon each of the following conditions:

(i) The holders of a majority of the outstanding shares of the Capital Stock of Tenneco entitled to vote shall have approved of the amending of Tenneco's Articles of Incorporation so as to authorize

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the issuance of the class of securities to be issued to Kern pursuant to this Agreement and Plan of Reorganization and the increase in the authorized number of shares of Tenneco's Common Stock from 60,000,000 to 100,000,000; and

(ii) The holders of a majority of the outstanding shares of the Capital Stock of Kern shall have approved the exchange as provided for herein, the liquidation and dissolution of Kern and the change of its name to "600 California Corporation."

(iii) The favorable tax ruling requested pursuant to Article X hereof shall have received at or prior to the Closing Date.

(iv) Tenneco and KCL shall have acknowledged in writing to Kern at least three days prior to the Closing Date that the access to properties, records and personnel of Kern referred to in Article IV hereof has been permitted to the extent requested by Tenneco and KCL.

(v) All acts, proceedings, instruments and documents required to carry out this Agreement and Plan of Reorganization or incident thereto and all other related legal matters shall have been approved by counsel for Tenneco, KCL and Kern.

(vi) Kern shall have received an opinion of Charles S. Taylor, Jr., counsel for Tenneco, dated as of the Closing Date in form and substance satisfactory to Kern to the effect that:

(a) Tenneco and KCL are each corporations duly organized and existing and in good standing under the laws of the State of Delaware and KCL is qualified to do business and is in good standing as a foreign corporation in each of the jurisdictions in which Kern is qualified to do business.

(b) All corporate and other proceedings required to be taken by and on the part of Tenneco and KCL to authorize them to enter into and carry out this Agreement and Plan of Reorganization and to deliver the Tenneco $5.50 Cumulative Convertible Preference Stock deliverable hereunder have been duly and properly taken. All shareholder action and other proceedings required to be taken by or on the part of Tenneco and KCL to authorize them to enter into this Agreement and Plan of Reorganization and to carry out their obligations hereunder have been duly and properly taken.

(c) This Agreement and Plan of Reorganization has been duly executed and delivered by Tenneco and KCL and is a valid and binding obligation of each such corporation enforceable against each of them in accordance with its terms.

(d) The shares of Tenneco $5.50 Cumulative Convertible Preference Stock delivered to Kern pursuant hereto are duly authorized, validly issued, fully paid and nonassessable and KCL has the power and authority to deliver such shares free of any charges, liens or encumbrances to Kern as contemplated hereby and such shares have been duly issued.

(e) Tenneco has authorized common stock reserved for issuance upon the conversion of all of the shares of Tenneco $5.50 Cumulative Convertible Preference Stock issuable hereunder into shares of the $5.00 par value common stock of Tenneco.

(vii) Tenneco, pursuant to the approval of its shareholders, has authorized the issuance of its $5.50 Cumulative Convertible Preference Stock pursuant hereto and has reserved for issuance pursuant to the rights of the holders of such $5.50 Cumulative Convertible Preference Stock a sufficient number of shares of Tenneco Common Stock into which such Cumulative Convertible Preference Stock may be converted.

(viii) The representations and warranties of Tenneco and KCL in Article II hereof shall be correct in all material respects on and as of the Closing Date with the same force and effect as though such representations had been made on and as of said date and Tenneco and KCL shall each have delivered to Kern a certificate to such effect signed by their duly authorized officers.

(ix) All of the terms and conditions of this Agreement and Plan of Reorganization to be complied with and performed by Tenneco and KCL on or before the Closing Date shall have been complied with and performed.

(x) The business and properties of Tenneco shall not have been adversely affected in any mate way as the result of any fire, accident or other calamity.

(xi) From and after the date of this Agreement and Plan of Reorganization to the Closing Da Tenneco:

(a) Shall not have taken any action which would change in any material respect the nature of i business except in relation to the transactions contemplated hereunder.

(b) Shall not have authorized or made any split up of its common stock or other changes in th rights of holders of shares of its common stock or created any new class of capital stock except a provided in Paragraph 9.1 (vii), or taken any other action which, if the Certificate of Designatio attached hereto as Exhibit D had been in effect, would have resulted in any change in the conversio rate applicable to the Cumulative Convertible Preference Stock.

(c) Shall not have declared or paid any dividend or made any other distribution to the holde of its common stock or preferred stocks except any dividends contemplated under paragraph 6. hereof and on the Closing Date Tenneco shall have delivered to Kern a certificate dated as of th Closing Date signed by a Vice President and the Secretary of Tenneco to the foregoing effect.

(xii) At the Closing Date no action or proceeding shall have been instituted by any governmenta agency in any court or threatened by any governmental agency in which it is sought to restrain or prohib the consummation of the transactions contemplated by this Agreement and Plan of Reorganization.

(xiii) No shareholder of Kern or Tenneco shall have instituted or threatened to institute any proceed ing to enjoin or restrain the consummation of the transaction herein contemplated or to prohibit th issuance of Tenneco Preference Stock deliverable hereunder.

(xiv) All permits, licenses and authorizations necessary to be obtained from the Division of Corp rations of the State of California for the issuance of the Tenneco securities to be issued hereunder sh have been obtained and all conditions and requirements thereof shall have been performed.

ARTICLE X
Tax Ruling

10.1 Kern, Tenneco and KCL believe that the exchange contemplated under this Agreement and Plan Reorganization is a tax free reorganization under section 368(a)(1)(C) of the Internal Revenue Code 1954 as amended, and that the exchange contemplated hereby will result in no taxable gain or loss to Kern the shareholders of Kern if the shares of Tenneco stock to be exchanged hereunder are distributed to t shareholders of Kern in complete liquidation of Kern in accordance with this Agreement and Plan Reorganization. Prior to the submission of this Agreement and Plan of Reorganization to the shareholders each Kern and Tenneco for approval, Kern and Tenneco will file an application with the Reorganizat Branch of the Internal Revenue Service requesting a ruling that no taxable gain or loss will result to Kern its shareholders from the exchange contemplated hereunder and for such other rulings as counsel for a parties may reasonably request.

10.2 If, in the opinion of counsel for Kern or Tenneco, the tax rulings obtained are unsatisfactory substance or in form, the matter in such rulings considered by either such party to be unsatisfactory s be set forth in a letter to the other party hereto stating the reason such matters are considered unsa factory, and the receipt by either party of a letter of such nature from the other party shall be a c of termination of this Agreement and Plan of Reorganization without liability upon the part of any p hereto to the others.

ARTICLE XI
Pooling of Interests

11.1 Tenneco and KCL believe that they will be permitted to utilize "pooling of interests" acc ing treatment in connection with and subsequent to the receipt by KCL of the assets, properties, bus and goodwill of Kern, and Tenneco and KCL may seek, prior to the Closing Date, the approval o

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curities and Exchange Commission in a form satisfactory to Tenneco and KCL assuring them that such ooling of interests concept will be permitted to be utilized. The term "pooling of interests" shall have e meaning stated in Accounting Research Bulletin No. 48 dated January, 1957 issued by the Committee Accounting Procedure of the American Institute of Accountants. If Tenneco and KCL shall seek such surance from the Securities and Exchange Commission such assurance shall be sought by them on before August 1, 1967, and should they fail to obtain the same, Tenneco and KCL shall set forth a letter to Kern the reasons that such Commission has denied them the right to utilize "pooling of erests" and the receipt by Kern of such a letter shall be a cause for termination of this Agreement d Plan of Reorganization without liability upon the part of any party hereto to the others.

ARTICLE XII

Employment Policies of Tenneco and KCL

12.1 Tenneco and KCL hereby advise Kern that they intend subsequent to the Closing Date to con- ue employment of the present management and employees of Kern and its Subsidiaries and to continue in fect the same pension, retirement, hospitalization, investment and profit-sharing, life insurance, incentive mpensation and other employee plans and benefits as have heretofore been in effect with regard to Kern's ployees, including the establishment and maintenance of a qualified stock option plan paralleling the an of Kern within the meaning of the appropriate provisions of the Internal Revenue Code of 1954 as ended which at Closing Date will replace the plan of Kern insofar as it covers unexercised Kern ployee stock options so as to afford the holders of such unexercised options the rights heretofore ting for their benefit under the Kern plan. KCL may also at the Closing Date amend its Articles of corporation so as to change its name from KCL Corporation to "Kern County Land Company" and d thereafter carry on its business with substantially the same management and personnel and utilizing r all the purposes the seniority and employment records of all employees of Kern as of the Closing te as a basis for the rights of such employees under such plans and benefit programs. It is the intention KCL that within one year from and after the Closing Date, it will grant to the employees of Kern who ve become employees of KCL the right and option to either continue under the Kern plans and benefit ograms or to participate in KCL's plans and benefit programs which shall be substantially the plans and nefit programs now maintained by Tenneco.

ARTICLE XIII

Termination of this Agreement and Plan of Reorganization

13.1 Kern, Tenneco and KCL each agrees to use its best efforts to bring about the satisfaction of conditions cast upon them respectively by virtue of the terms and provisions of this Agreement and n of Reorganization; but if any material condition specified herein is not substantially satisfied and such ition is not waived by the party or parties for the benefit of which such condition is stated, such party may minate this Agreement and Plan of Reorganization by notice in writing to the other parties. In the event such termination this Agreement and Plan of Reorganization shall cease and terminate and no party hereto all have any liability hereunder of any nature whatsoever to any other party hereto, except in respect of ligations theretofore to be performed.

ARTICLE XIV

Confidential Treatment of Kern and Tenneco Information

14.1 Kern, Tenneco and KCL covenant that in the event the transactions contemplated by the Agree- nt and Plan of Reorganization shall not be consummated, they respectively will keep and maintain in nfidence all information concerning the properties, business, activities, assets and goodwill obtained any of them concerning any other of them in the course of the examination of the affairs of such r of them pursuant to the provisions of this Agreement and Plan of Reorganization and shall return to another all copies of documents, data, schedules and the like which such party shall have thereto- re acquired from any other party hereto relative to such other party's business, properties, assets, ll and activities.

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ARTICLE XV

Assignment, Amendment and Abandonment of the Agreement and Plan of Reorganization

15.1 This Plan of Reorganization shall not be assigned by any of the parties hereto except w written consent of the other parties hereto.

15.2 At any time before or after the special meetings of shareholders of Kern and Tenneco refer to herein, this Agreement and Plan of Reorganization may without the approval of Tenneco's or Ker shareholders be amended by written agreement by all of the parties hereto and any such amendment m

(i) change the time for performance of any of the obligations or actions of the parties here including changes of the time and place of the Closing,

(ii) waive any inaccuracies in or modify the representations contained herein or in any exhib hereto or in any schedules or documents delivered pursuant hereto, and

(iii) waive compliance with or modify any of the covenants and conditions contained here and waive or modify performance of any of the obligations of the parties hereto;

provided, however, that no modification, waiver or amendment shall be made which will affect the nu ber of shares of Tenneco $5.50 Cumulative Convertible Preference Stock deliverable for each share the capital stock of Kern on liquidation of Kern, or which would cause any liability of Kern to be ou standing at and after the Closing Date and not assumed by KCL other than Kern's obligations to cause t distribution of the Tenneco shares delivered hereunder to Kern's shareholders in liquidation and thereafter promptly dissolve.

15.3 This Agreement and Plan of Reorganization may be abandoned by mutual agreement of t parties hereto after the affirmative vote of the holders of a majority of the validly issued and outstand shares of both Kern and Tenneco at the special meetings of shareholders to be convened pursuant to t provisions hereof without further action on the part of the shareholders of Kern and Tenneco b with the approval of their respective Boards of Directors.

ARTICLE XVI

Notices

16.1 Any notice or communication given pursuant hereto by any party to any other party her shall be in writing and delivered or mailed by registered mail, postage prepaid, as follows:

If to Kern:

Mr. Dwight M. Cochran, President
Kern County Land Company
600 California Street
San Francisco, California 94108

If to Tenneco or KCL:

Mr. N. W. Freeman, President, and
Mr. W. E. Scott, Senior Vice-President
Tenneco Inc.
P. O. Box 2511
Houston 1, Texas

or at such other address as hereafter shall be furnished in writing by any party hereto to the other par

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ARTICLE XVII

Miscellaneous

17.1 This Agreement and Plan of Reorganization supersedes all agreements heretofore reached orally in writing between the parties hereto.

17.2 Kern, Tenneco and KCL agree that their respective representations and warranties contained in ticles I and II above shall expire with, and be terminated and extinguished by, the closing under this greement and Plan of Reorganization on the Closing Date, and that, the Closing having been consummated, ither Kern, Tenneco nor KCL shall be under any liability whatsoever with respect to any such representation warranty.

17.3 This Agreement and Plan of Reorganization has been negotiated pursuant to a Negotiating ermit issued to Tenneco by the Division of Corporations of the State of California on May 18, 1967. ne of the requirements of said Negotiating Permit is that the following language be incorporated herein boldface type:

"The Commissioner of Corporations of the State of California has made no finding or determination in relation to the fairness of the negotiation or agreements hereby permitted and this negotiating permit is permissive only and does not constitute a recommendation or endorsement of the securities permitted to be offered and should not be understood as an indication that such finding or determination of fairness will be made or that a definitive permit authorizing sale or issuance of securities, if applied for, will be granted."

IN WITNESS WHEREOF the parties hereto have executed this Agreement and Plan of Reorganization multiple counterparts, each of which shall be deemed to be but one and the same instrument, as of e day and year first above written.

KERN COUNTY LAND COMPANY

By DWIGHT M. COCHRAN
President

[Corporate Seal]

TEST

H. G. HAWKINS, JR.
Secretary

TENNECO INC.

By GARDINER SYMONDS
Chairman of the Board of Directors

[Corporate Seal]

TEST

ALFRED B. SMITH, JR.
Assistant Secretary

KCL CORPORATION

By CHARLES S. TAYLOR, JR.
Vice-President

[Corporate Seal]

TEST

ALFRED B. SMITH, JR.
Assistant Secretary

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Exhibit B

DESCRIPTION OF TENNECO $5.50 CUMULATIVE CONVERTIBLE PREFERENCE STOCK

The authorized capital stock of Tenneco as provided in the Certificate of Incorporation, as amen (herein called the "Certificate of Incorporation"), consists of an aggregate of 64,394,500 shares, div into 2,394,500 shares of Preferred Stock, of the par value of $100 per share; 2,000,000 shares of Se Preferred Stock, of the par value of $100 per share and 60,000,000 shares of Common Stock, of the value of $5 per share. Upon the effectiveness of the proposed amendment to the Certificate of Incorpora Tenneco will be authorized to issue 108,894,500 shares, divided into 2,394,500 shares of Preferred Stock the par value of $100 per share (herein called Preferred Stock); 2,000,000 shares of Second Preferred St of the par value of $100 per share (herein called Second Preferred Stock); 4,500,000 shares of Prefer Stock, without par value (herein called Preference Stock) and 100,000,000 shares of Common Stock, of par value of $5 per share (herein called Common Stock). The proposed Preference Stock may be iss in one or more series. Subject to the carrying out of the Agreement and Plan of Reorganization for acquisition by a Tenneco subsidiary of the business and assets of Kern County Land Company, there will series of Preference Stock to be designated $5.50 Cumulative Convertible Preference Stock (herein ca Cumulative Convertible Preference Stock). Additional shares of Preference Stock of other series may be iss from time to time, subject to the limitations to be set forth in the Certificate of Incorporation and in the res tion of the Board of Directors providing for such series, the terms of additional shares of other series to be forth in such resolution to the extent permitted by the Certificate of Incorporation. All shares of Prefer Stock rank on a parity with respect to dividend and liquidation rights, irrespective of series. The Prefer Stock ranks junior to the Preferred Stock and Second Preferred Stock and the Common Stock ranks jun to the Preferred Stock, Second Preferred Stock and Preference Stock in respect of dividends and distribu of assets on liquidation.

The following is a brief description of the terms of the Preference Stock and the Common Stock the same will be constituted when the Certificate of Amendment to the Certificate of Incorporation creat the Preference Stock and the Certificate of Designation creating the $5.50 Cumulative Convertible series ther become effective.

Dividend Rights

Subject to the prior rights of the holders of the Preferred Stock and Second Preferred Stock, the hold of Preference Stock are entitled to receive, when and as declared by the Board of Directors, cumulat preferential dividends in cash at the rate per annum fixed for the respective series, payable quarterly the first days of January, April, July and October in each year. Dividends will be payable on the Cum lative Convertible Preference Stock at the rate of $5.50 per year or $1.375 per quarter, and dividends ther will accrue from the date of issuance.

Subject to the prior rights of the holders of the Preferred Stock, Second Preferred Stock, and Pr erence Stock such dividends as may be determined by the Board of Directors may be declared and pa on the Common Stock from time to time out of any funds legally available therefor.

Unless the consent of a majority of each presently outstanding series of Preferred Stock is obtain (a) the total amounts paid or distributed on stock junior to the Preferred Stock after December 31, 19 and the total amounts applied to the acquisition of such junior stock after December 31, 1945 may n exceed the sum of Tenneco's net income accumulated since December 31, 1945 and available for dividen on such junior stock plus $62,500, and (b) no dividends may be paid on, or acquisitions made of, su junior stock if, after giving effect thereto, the net assets of Tenneco shall be less than 225% of the p value of the Preferred Stock and any other stock ranking prior to or on a parity with the preferred sto as to dividends or assets then outstanding. The foregoing restrictions do not apply to dividends payable stock junior to the Preferred Stock, or to the acquisition of such junior stock in exchange for, or out the proceeds of the issue of, such junior stock, or out of contributions to capital. No such dividend or acq sition need be taken into account in making the above computations.

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Unless the consent of a majority of the outstanding Second Preferred Stock is obtained, (a) the total amounts paid or distributed on stock junior to the Second Preferred Stock after December 31, 1945 and the total amounts applied to the acquisition of such junior stock after December 31, 1945 may not exceed the sum of Tenneco's net income accumulated since December 31, 1945 and available for dividends on such junior stock, and (b) no dividends may be paid on, or acquisitions made of, such junior stock if, after giving effect thereto, the net assets of Tenneco, after deducting the aggregate par value of the Preferred Stock and any other stock ranking prior to the Second Preferred Stock as to dividends or assets then outstanding, shall be less than 200% of the aggregate par value of the Second Preferred Stock, and any other stock ranking on a parity with the Second Preferred Stock as to dividends or assets then outstanding. The foregoing restrictions do not apply to dividends payable in stock junior to the Second Preferred Stock, or to the acquisition of such junior stock in exchange for, or out of the proceeds of the substantially contemporaneous issue of, such junior stock, or out of contributions to capital. No such dividend or acquisition need be taken into account in making the above computations.

Tenneco may not acquire for value any shares of Preference Stock or of any other stock ranking on a parity with the Preference Stock as to dividends or assets while dividends on the Preference Stock are in default, without the consent of the holders of at least a majority of the shares of Preference Stock present at the annual meeting or special meeting called for the purpose, provided that at least a majority of the outstanding shares of Preference Stock is present at such meeting.

No dividends whatsoever may be paid on any stock junior to the Preferred Stock as to dividends or assets, nor may any shares of such junior stock be acquired by Tenneco, unless Tenneco has fully complied with the sinking fund provisions for all outstanding series of Preferred Stock. No dividends may be paid on any stock junior to the Second Preferred Stock, nor may any shares of such junior stock be acquired by Tenneco, unless Tenneco has fully complied with the applicable sinking fund provisions for all series of Second Preferred Stock. No dividends may be paid on any stock junior to the Preference Stock, nor may any shares of such junior stock be acquired by Tenneco, unless all past and current dividends on the Preference Stock shall have been declared and paid.

So long as any of its presently outstanding First Mortgage Pipe Line Bonds remain outstanding, Tenneco may not make any payments or distributions on stock junior to the Preferred Stock as to dividends or assets or acquire for a consideration any capital stock if the total amounts paid or distributed on the capital stock of Tenneco after December 31, 1945 and the total amounts applied to the acquisition of any capital stock of Tenneco after December 31, 1945 exceed Tenneco's net income accumulated since December 31, 1945 available for dividends on capital stock. The foregoing restriction does not apply to dividends payable in stock junior to the Preferred Stock, or to the acquisition of capital stock in exchange for, or out of the proceeds of the issue of, capital stock, or out of contributions to capital. No such dividend or acquisition need be taken into account in making the above computation.

So long as any of its presently outstanding Debentures are outstanding Tenneco may not declare or pay any dividend or make any other distribution upon its capital stock ranking junior to its Preferred stock, or acquire for a consideration any capital stock (excluding from such restriction and from the following calculations dividends paid in junior stock and capital stock purchased, redeemed or otherwise acquired, to the extent that it was so acquired in exchange for or from the proceeds of the substantially concurrent sale of other capital stock or out of capital contributions), if after giving effect thereto (a) the cumulative aggregate amount of all dividends and distributions declared or paid on the capital stock and the amount paid for the acquisition of capital stock subsequent to December 31, 1947, exceeds the aggregate amount of the net income of Tenneco subsequent to such date, plus $735,000; or (b) the sum of Tenneco's capital stock, surplus and premium on capital stock, less the sum of Tenneco's investments (other than investments in subsidiaries as defined) as then recorded on the books of Tenneco, is less than 1.4 times the aggregate principal amount of the unsecured funded debt of Tenneco.

So long as any of its presently outstanding Debentures are outstanding, Tenneco may not declare or pay any dividend or make any other distribution upon, or acquire for a consideration, any of its Common

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Stock at a time when, after giving effect to such dividend, distribution or acquisition, the outstanding funded debt of Tenneco shall exceed 70% of its capitalization (excluding from such restriction and from the following calculation dividends paid in Common Stock and Common Stock acquired to the extent that it was acquired in exchange for or from the proceeds of the substantially concurrent sale of other Common Stock, or out of capital contributions), if after giving effect thereto the cumulative aggregate amount of all dividends and distributions declared or paid on the Common Stock and the amount paid for the acquisition of Common Stock subsequent to December 31, 1947, exceeds 75% of the total of (i) the net income of Tenneco available for dividends on Common Stock subsequent to such date, and (ii) $735,000.

After giving effect to the restrictions then in effect on the payment of dividends on stock junior to the Second Preferred Stock summarized above, approximately $138,700,000 of consolidated retained earnings was not restricted for payment of dividends on stock junior to the Second Preferred Stock at March 31, 1967.

Voting Rights

Subject to the right of the holders of Preferred Stock to elect a minimum majority of the Board of Directors whenever dividends on the outstanding Preferred Stock are in arrears in an amount equal to six quarterly dividends thereon, and except for such additional voting rights as may be provided for any series of Preferred Stock, Second Preferred Stock or Preference Stock in the resolution of the Board of Directors providing for the issuance thereof (no such provision having been made as to any outstanding series of Preferred or Second Preferred Stock), holders of Second Preferred Stock and Common Stock are, and holders of the Cumulative Convertible Preference Stock will be, entitled to one vote for each share held at all meetings of stockholders. Whenever dividends on the Cumulative Convertible Preference Stock are in arrears in an amount equal to six quarterly dividends thereon, holders of the Cumulative Convertible Preference Stock have the right to elect two directors until all accrued and unpaid dividends on the Cumulative Convertible Preference Stock are paid in full.

Tenneco is not permitted to amend any of the capital stock provisions of the Certificate of Incorporation so as to affect adversely the rights, powers or preferences of the Preference Stock (other than provisions relating exclusively to a particular series of Preference Stock) without the consent of the holders of at least two-thirds of the outstanding shares of Preference Stock, irrespective of series, and Tenneco may not amend any of the capital stock provisions of the Certificate of Incorporation or of any resolutions relating exclusively to a particular series of Preference Stock so as to affect adversely the rights, powers or preferences of such series, without the consent of the holders of at least two-thirds of the outstanding shares of such series.

Tenneco may not, without the affirmative vote of the holders of at least a majority of the outstanding shares of Preference Stock, at an annual meeting or special meeting called for the purpose (a) create or authorize any additional class of stock ranking prior to the Preference Stock as to dividends or assets, or increase the authorized amount of Preferred Stock, Second Preferred Stock or any other class of stock ranking prior to the Preference Stock as to dividends or assets or create or authorize any obligation or security convertible into shares of Preferred Stock, Second Preferred Stock or shares of stock of any other class ranking prior to the Preference Stock as to dividends or assets, or (b) transfer substantially all its property or business, or consolidate with or merge into any other corporation; this provision, however, does not apply to a merger of another corporation into Tenneco or to mortgages of property of Tenneco. Shares of Second Preferred Stock which are redeemed, converted or otherwise reacquired by Tenneco assume the status of authorized but unissued Second Preferred Stock issuable by resolution of the Board of Directors in the same manner as other authorized but unissued Second Preferred Stock.

Tenneco may not, without the affirmative vote of the holders of at least a majority of the outstanding shares of Preference Stock, (a) create or authorize any class of stock ranking on a parity with the Preference Stock as to dividends or assets, or (b) increase the authorized amount of Preference Stock or of any class of stock ranking on a parity with the Preference Stock as to dividends or assets, or (c) create or authorize any obligation or security convertible into shares of Preference Stock or shares of stock of any class ranking on a parity with the Preference Stock as to dividends or assets.

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Liquidation Rights

After payment has been made in full to the holders of the Preferred Stock and Second Preferred Stock, the holders of Preference Stock are entitled to receive, in the event of any voluntary liquidation, the preferential amounts fixed for the respective series ($110 per share until July 1, 1977 and thereafter the then applicable optional redemption price in the case of the Cumulative Convertible Preference Stock), and in the event of any involuntary liquidation, $100 per share, plus, in either case, all accrued and unpaid dividends to the date payment is made available.

After payment is made in full to the holders of the Preferred Stock, Second Preferred Stock and Preference Stock, the holders of Common Stock are entitled to receive the remaining assets and funds of Tenneco according to their respective shares.

Redemption Provisions of Cumulative Convertible Preference Stock

The Cumulative Convertible Preference Stock will be redeemable at the option of Tenneco, on or after July 1, 1977, on at least 30 days notice, in whole or in part, at the following redemption prices:

$110 per share if redeemed on or after July 1, 1977 and prior to July 1, 1978; or
$109 per share if redeemed on or after July 1, 1978 and prior to July 1, 1979; or
$108 per share if redeemed on or after July 1, 1979 and prior to July 1, 1980; or
$107 per share if redeemed on or after July 1, 1980 and prior to July 1, 1981; or
$106 per share if redeemed on or after July 1, 1981 and prior to July 1, 1982; or
$105 per share if redeemed on or after July 1, 1982 and prior to July 1, 1983; or
$104 per share if redeemed on or after July 1, 1983 and prior to July 1, 1984; or
$103 per share if redeemed on or after July 1, 1984 and prior to July 1, 1985; or
$102 per share if redeemed on or after July 1, 1985 and prior to July 1, 1986; or
$101 per share if redeemed on or after July 1, 1986 and prior to July 1, 1987; or
$100 per share if redeemed on or after July 1, 1987;

plus in each case accrued and unpaid dividends.

Conversion Provisions of Cumulative Convertible Preference Stock

Each share of Cumulative Convertible Preference Stock is convertible at the option of the holder at any time commencing July 1, 1969 or, if such shares shall be called for redemption, at any time prior to the close of business on the fifth day preceding the date fixed for redemption thereof, into 3.6 shares of Common Stock.

The number of shares of Common Stock into which each share of Cumulative Convertible Preference Stock may be converted is subject to certain adjustments designed to protect the conversion privilege against dilution. However, no adjustment is required to be made in connection with the issuance of additional shares of Cumulative Convertible Preference Stock or the issuance of shares of Common Stock on conversion of presently issued and outstanding shares of Second Preferred Stock or on the conversion of the Cumulative Convertible Preference Stock or pursuant to options now existing or hereafter granted to officers and employees of Tenneco and its subsidiaries or on exchange of Tenneco Corporation $1.60 Cumulative Second Preferred Stock or the reissuance of treasury shares.

No adjustment in respect of dividends will be made upon the conversion of the Cumulative Convertible Preference Stock. No fractional shares of Common Stock will be issued upon conversion, but in lieu thereof Tenneco will make a cash adjustment based upon the market price for the Common Stock.

Cumulative Convertible Preference Stock surrendered for conversion will assume the status of authorized but unissued Preference Stock and may not thereafter be reissued as Cumulative Convertible Preference Stock.

Miscellaneous

No holder of capital stock of Tenneco has any preemptive rights.

The Cumulative Convertible Preference Stock when issued to Kern County Land Company in exchange for its business and assets will be full paid and non-assessable. The outstanding Common Stock of Tenneco is

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full paid and non-assessable and the Common Stock of Tenneco to be issued upon conversion of the Cumulative Convertible Preference Stock as set forth herein will be full paid and non-assessable.

The Common Stock, in the event of any liquidation, dissolution or winding-up of the affairs of Tenneco, is entitled to receive pro rata the assets of Tenneco remaining after satisfaction of corporate liabilities and the prior rights of the Preferred Stock, Second Preferred Stock and Preference Stock.

The following statement is included in accordance with the requirements of the Commissioner of Corporations of the State of California:

Non-Cumulative Voting: The shares of Common Stock have non-cumulative voting rights which means that the holders of more than 50% of the shares voting for the election of directors can elect 100% of the directors if they choose to do so, and, in such event, the holders of the remaining less than 50% of the shares voting for the election of directors will not be able to elect any person or persons to the board of directors.

The Transfer Agents for the Common Stock are Chemical Bank New York Trust Company, New York, N. Y., Houston National Bank, Houston, Texas, The Northern Trust Company, Chicago, Illinois, and United California Bank, Los Angeles, California, and the Registrars for the Common Stock are First National City Bank, New York, N. Y., First City National Bank of Houston, Houston, Texas, Continental Illinois National Bank and Trust Company of Chicago, Chicago, Illinois, and Wells Fargo Bank, San Francisco, California.

The Transfer Agents for the Cumulative Convertible Preference Stock will be Manufacturers Hanover Trust Company, New York, N. Y., Houston National Bank, Houston, Texas, and Wells Fargo Bank, San Francisco, California, and the Registrars for the Cumulative Convertible Preference Stock will be Chemical Bank New York Trust Company, New York, N. Y., First City National Bank of Houston, Houston, Texas, and The Bank of California National Association, San Francisco, California.

The Common Stock of Tenneco is listed on the New York, Midwest and Pacific Coast Stock Exchanges, and Tenneco intends to apply to the New York and Pacific Coast Stock Exchanges for listing of the Cumulative Convertible Preference Stock on such exchanges.

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Exhibit C

TENNECO INC.

Certificate of Amendment of Certificate of Incorporation

TENNECO INC., a corporation organized and existing under and by virtue of the corporation law of the State of Delaware, does hereby certify:

FIRST: That at a meeting of the Board of Directors of said Corporation duly held and convened a resolution was duly adopted setting forth a proposed amendment to the Certificate of Incorporation of said Corporation and declaring said proposed amendment advisable and calling a special meeting of stockholders of said Corporation for consideration thereof. The resolution setting forth the proposed amendment is as follows:

WHEREAS, it is deemed advisable and in the best interests of the Corporation that the amount of its authorized capital stock be increased; and

WHEREAS, it is deemed advisable and in the best interests of the Corporation that the Certificate of Incorporation, as amended, be further amended so as to provide for the authorization of an additional class of capital stock to be known as "Preference Stock":

NOW, THEREFORE, BE IT AND IT IS HEREBY RESOLVED, that the Board of Directors of the Corporation does hereby declare it advisable and in the best interests of the Corporation and does hereby recommend to the stockholders of the Corporation, that the Certificate of Incorporation, as amended, be further amended by the adoption of the following resolution by the stockholders at a special meeting of stockholders of the Corporation to be held on July 11, 1967, or at any adjournment or adjournments thereof:

(a) BE IT RESOLVED, by the stockholders of Tenneco Inc. (herein called the "Corporation"), that the Certificate of Incorporation of the Corporation, as amended, be and the same is hereby further amended by deleting in its entirety the first paragraph of Article FOURTH thereof, and by inserting in lieu thereof the provisions hereinafter set forth so as to increase the authorized capital stock of the Corporation from an aggregate of 64,394,500 shares, divided into 2,394,500 shares of Preferred Stock, of the par value of $100 per share, 2,000,000 shares of Second Preferred Stock, of the par value of $100 per share, and 60,000,000 shares of Common Stock, of the par value of $5 per share, to an aggregate of 108,894,500 shares, divided into 2,394,500 shares of Preferred Stock, of the par value of $100 per share, 2,000,000 shares of Second Preferred Stock, of the par value of $100 per share, 4,500,000 shares of Preference Stock, without par value, and 100,000,000 shares of Common Stock, of the par value of $5 per share, with the result that the first paragraph of said Article FOURTH shall be and read as follows:

> "FOURTH: The total number of shares of all classes of stock which the corporation shall be authorized to issue is 108,894,500 shares, divided into 2,394,500 shares of Preferred Stock, of the par value of $100 per share (herein called 'Preferred Stock'), 2,000,000 shares of Second Preferred Stock, of the par value of $100 per share (herein called 'Second Preferred Stock'), 4,500,000 shares of Preference Stock, without par value (herein called 'Preference Stock'), and 100,000,000 shares of Common Stock, of the par value of $5 per share (herein called 'Common Stock')."

(b) BE IT FURTHER RESOLVED, by the stockholders of Tenneco Inc. that the Certificate of Incorporation, as amended, be and the same is hereby further amended by deleting in their entirety from Article FOURTH thereof the parts thereof designated "III" and "IV" and inserting in lieu thereof the provisions hereinafter set forth as "III", "IV" and "V", as follows:

"III.

1. The Preference Stock may be issued in one or more series. The designations, powers, preferences and relative, optional, conversion and other special rights, and the qualifications, limitations and restrictions thereof, of the Preference Stock of each series shall be such as are stated and

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expressed herein and, to the extent not stated and expressed herein, shall be such as may be fixed by the Board of Directors (authority so to do being hereby expressly granted) and stated and expressed in a resolution or resolutions adopted by the Board of Directors providing for the issue of Preference Stock of such series. Subject to the prior rights of the holders of the Preferred Stock and Second Preferred Stock as set forth in Parts I and II of this Article FOURTH, such resolution or resolutions shall (a) specify the series to which such Preference Stock shall belong, (b) fix the dividend rate therefor, (c) fix the amount which the holders of the Preference Stock of such series shall be entitled to be paid in the event of a voluntary or involuntary liquidation, dissolution or winding up of the corporation, provided that such amount in the event of an involuntary liquidation shall not exceed $100 per share, (d) state whether or not the Preference Stock of such series shall be redeemable and at what times and under what conditions and the amount or amounts payable thereon in the event of redemption; and may, in a manner not inconsistent with the provisions of this Article FOURTH, (i) limit the number of shares of such series which may be issued, (ii) provide for a sinking fund for the purchase or redemption, or a purchase fund for the purchase, of shares of such series and the terms and provisions governing the operation of any such fund and the status as to reissuance of shares of Preference Stock purchased or otherwise reacquired or redeemed or retired through the operation thereof, and that so long as the corporation is in default as to such sinking or purchase fund the corporation shall not (with such exceptions, if any, as may be provided) pay any dividends upon or purchase or redeem shares of capital stock ranking junior to the Preference Stock with respect to dividends or distribution of assets upon liquidation (referred to in this Part III of Article FOURTH as 'stock ranking junior to the Preference Stock'), (iii) grant voting rights to the holders of shares of such series in addition to and not inconsistent with those granted by this Part III of Article FOURTH to the holders of Preference Stock, (iv) impose conditions or restrictions upon the creation of indebtedness of the corporation or upon the issue of additional Preference Stock or other capital stock ranking on a parity therewith or prior thereto with respect to dividends or distribution of assets upon liquidation, (v) impose conditions or restrictions upon the payment of dividends upon, or the making of other distributions to, or the acquisition of, stock ranking junior to the Preference Stock, (vi) grant to the holders of the Preference Stock of such series the right to convert such stock into shares of stock ranking junior to the Preference Stock, and (vii) grant such other special rights to the holders of shares of such series as the Board of Directors may determine and as shall not be inconsistent with the provisions of this Article FOURTH or the prior rights of the holders of Preferred Stock and Second Preferred Stock as set forth in Parts I and II of this Article FOURTH. The term 'fixed for such series' and similar terms as used in this Part III of Article FOURTH shall mean stated and expressed in this Part III of Article FOURTH or in a resolution or resolutions adopted by the Board of Directors providing for the issue of Preference Stock of the series referred to therein.

2. Subject to the prior rights of the holders of Preferred Stock and Second Preferred Stock as set forth in Parts I and II of this Article FOURTH, and to the conditions set forth therein or in any resolution of the Board of Directors providing for the issuance of any particular series of Preferred Stock or Second Preferred Stock, the holders of the Preference Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any funds legally available therefor, cumulative preferential dividends in cash, at the rate per annum fixed for such series, and no more, payable quarter-yearly on the first days of January, April, July and October in each year to stockholders of record on a date, not exceeding fifty days preceding each such dividend payment date, fixed for the purpose by the Board of Directors in advance of payment of each particular dividend. Dividends on shares of the Preference Stock shall accrue from the date of issuance, or from such other date or dates as may be fixed by the Board of Directors for any series, and shall be cumulative. Each share of Preference Stock shall rank on a parity with each other share of Preference Stock, irrespective of series, with respect to preferential dividends at the respective rates fixed for such series, and no dividend shall be declared or paid or set apart for payment for the Preference Stock of any series unless at the same time a dividend in like proportion to the dividends accrued upon the

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Preference Stock of each other series shall be declared or paid or set apart for payment, as the case may be, on Preference Stock of each other series then outstanding.

3. So long as any shares of Preference Stock shall remain outstanding, in no event shall any dividends whatsoever, whether in cash, stock, or otherwise, be paid or declared, or any distribution be made on any class of stock ranking junior to the Preference Stock, nor shall any shares of stock ranking junior to the Preference Stock be purchased, retired or otherwise acquired for a valuable consideration by the corporation, unless all dividends on the Preference Stock for all past quarter-yearly dividend periods shall have been paid, or declared and a sum sufficient for the payment thereof set apart, and the full dividend thereon for the then current quarter-yearly dividend period shall have been paid or declared.

4. Subject to the prior rights of the holders of Preferred Stock and Second Preferred Stock as set forth in Parts I and II of this Article FOURTH, and to the conditions set forth therein or in any resolution of the Board of Directors providing for the issuance of any particular series of Preferred Stock or Second Preferred Stock, the corporation at the option of the Board of Directors may redeem the Preference Stock of any series which by its terms is redeemable, at the time or times and on the terms and conditions fixed for such series, upon notice duly given as hereinafter provided, by paying therefor in cash the sum fixed for such series, together, in each case, with an amount equal to accrued and unpaid dividends thereon. The term 'accrued and unpaid dividends' as used in this Part III of Article FOURTH with respect to Preference Stock of any series shall mean dividends on all outstanding shares of Preference Stock of such series at the rate fixed for such series, from the date or dates from which such dividends accrued to the date as of which accrued and unpaid dividends are being determined, less the aggregate amount of all dividends theretofore declared and paid or set apart for payment upon such outstanding Preference Stock.

At least thirty days' previous notice of any such redemption of Preference Stock shall be mailed, addressed to the holders of record of the shares to be redeemed at their respective addresses as the same shall appear on the books of the corporation, and such notice may also be published in a newspaper printed in the English language and published daily for at least five days per calendar week (other than legal holidays) and of general circulation in the Borough of Manhattan, The City of New York, New York.

In case of the redemption of only part of the Preference Stock of any series at the time outstanding, subject to the limitations and provisions herein contained, the shares to be redeemed may be selected pro rata, or by lot, or by such other equitable method as may be determined by the Board of Directors and the Board of Directors shall have full power and authority to prescribe the manner in which the redemption shall be conducted.

If such notice of redemption shall have been duly given by publication as aforesaid at least thirty days prior to the redemption date, and if on or before the redemption date specified in such notice all funds necessary for such redemption shall have been set aside by the corporation, separate and apart from its other funds, in trust for the pro rata benefit of the holders of the shares so called for redemption, so as to be and continue to be available therefor, then, notwithstanding that any certificate for shares of Preference Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby shall no longer be deemed outstanding, the right to receive dividends thereon shall cease to accrue from and after the date of redemption so designated and all rights with respect to such shares of Preference Stock so called for redemption shall forthwith on such redemption date cease and terminate except only the right of the holders thereof to receive the redemption price of such shares so to be redeemed, but without interest thereon.

The corporation may, however, prior to the redemption date specified in the notice of redemption, deposit in trust for the account of the holders of the Preference Stock to be redeemed, with a bank or trust company in good standing organized under the laws of the United States of America or of the State of New York, doing business in the Borough of Manhattan, The City of New York, having a capital, surplus and undivided profits aggregating at least $50,000,000, designated in such notice of

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redemption, all funds necessary for such redemption, together with irrevocable written instructions authorizing such bank or trust company, on behalf and at the expense of the corporation, to cause the notice of redemption to be duly mailed and, at the option of the corporation, the publication of such notice to be made as herein provided at least thirty days prior to the redemption date, and thereupon, notwithstanding that any certificate for shares of Preference Stock so called for redemption shall not have been surrendered for cancellation, all shares of Preference Stock with respect to which such deposit shall have been made shall no longer be deemed to be outstanding and all rights with respect to such shares of Preference Stock shall forthwith upon such deposit in trust cease and terminate, except only the right of the holders thereof to receive from such bank or trust company, at any time after the time of such deposit, the redemption price of such shares so to be redeemed.

Any moneys so deposited by the corporation and unclaimed at the end of six months from the date fixed for such redemption shall be repaid to the corporation upon its request expressed in a resolution of its Board of Directors, after which repayment the holders of the shares so called for redemption shall look only to the corporation for payment thereof.

5. (A) So long as any shares of Preference Stock are outstanding the corporation shall not, without the consent of the holders of at least two-thirds of the number of shares of Preference Stock at the time outstanding, given in person or by proxy, either in writing or by vote at an annual meeting or a special meeting called for the purpose, amend, alter or repeal any of the provisions of this Article FOURTH (other than provisions relating exclusively to the shares of Preference Stock of a particular series) so as to affect adversely the rights, powers or preferences of Preference Stock or of the holders thereof; and so long as any shares of any particular series of Preference Stock are outstanding the corporation shall not, without the consent of the holders of at least two-thirds of the number of shares of Preference Stock of such series at the time outstanding, given in person or by proxy, either in writing or by a vote at an annual meeting or a special meeting called for the purpose, amend, alter or repeal any of the provisions of this Article FOURTH or of any resolution or resolutions relating exclusively to the shares of Preference Stock of such series, so as to affect adversely the rights, powers or preferences of the Preference Stock of such series or the holders thereof.

(B) So long as any shares of Preference Stock are outstanding the corporation shall not, without the consent of the holders of at least a majority of the number of shares of Preference Stock at the time outstanding, given in person or by proxy, either in writing or by vote at an annual meeting or a special meeting called for that purpose:

(a) create or authorize any additional class of stock ranking prior to the Preference Stock in respect of dividends or distribution of assets on liquidation; or increase the authorized amount of Preferred Stock, Second Preferred Stock or any additional class of stock ranking prior to the Preference Stock in respect of dividends or distribution of assets on liquidation; or create or authorize any obligation or security convertible into shares of Preferred Stock, Second Preferred Stock or shares of stock of any additional class ranking prior to the Preference Stock in respect of dividends or distribution of assets on liquidation; or

(b) sell, lease, transfer or convey all, or substantially all, of its property or business, or consolidate with or merge into any other corporation or corporations; *provided, however*, that this subparagraph shall not apply to any merger of another corporation into the corporation or to any mortgage, pledge or other hypothecation of property of the corporation.

(C) So long as any shares of Preference Stock are outstanding the corporation shall not, without the consent of the holders of at least a majority of the number of shares of Preference Stock at the time outstanding, given in person or by proxy, either in writing or by vote at an annual meeting or a special meeting called for the purpose:

(a) create or authorize any class of stock ranking on a parity with the Preference Stock in respect of dividends or distribution of assets on liquidation; or

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(b) increase the authorized amount of the Preference Stock or of any class of stock ranking on a parity with the Preference Stock in respect of dividends or distribution of assets on liquidation; or

(c) create or authorize any obligation or security convertible into shares of Preference Stock or shares of stock of any class ranking on a parity with the Preference Stock in respect of dividends or distribution of assets on liquidation.

(D) So long as any shares of Preference Stock are outstanding the corporation shall not purchase, redeem or otherwise acquire for value any shares of Preference Stock or of any other stock ranking on a parity with the Preference Stock in respect of dividends or distribution of assets on liquidation during the continuance of any default in the payment of dividends on the Preference Stock without the consent, given in person or by proxy by vote at an annual meeting or at a special meeting called for that purpose, of the holders of at least a majority of the number of shares of Preference Stock present in person or by proxy at such meeting, provided that a quorum, consisting of at least a majority of the then outstanding shares of Preference Stock, is present.

(E) Any action specified in this subdivision 5 as requiring the consent of the holders of at least a specified proportion of the number of shares of Preference Stock or of any particular series thereof at the time outstanding or represented at a meeting may be taken with such consent and with such additional vote or consent, if any, of stockholders as may be from time to time required by this Certificate of Incorporation, as amended from time to time, or by law.

6. In the event of any liquidation, dissolution or winding up of the affairs of the corporation, then, before any distribution or payment shall be made to the holders of any class of stock of the corporation ranking junior to the Preference Stock, the holders of the Preference Stock of the respective series (subject to the rights of the Preferred Stock and Second Preferred Stock) shall be entitled to be paid in full the respective amounts fixed for such series. After such payment shall have been made in full to the holders of the Preference Stock, the remaining assets and funds of the corporation shall be distributed among the holders of the stocks of the corporation ranking junior to the Preference Stock according to their respective rights. In the event that the assets of the corporation available for distribution to holders of Preference Stock shall not be sufficient to make the payment herein required to be made in full, such assets shall be distributed to the holders of the respective shares of Preference Stock pro rata in proportion to the amounts payable hereunder upon each share thereof.

7. Except as otherwise provided in any resolution of the Board of Directors providing for the issuance of any particular series of Preference Stock, Preference Stock redeemed or otherwise acquired by the corporation shall assume the status of authorized but unissued Preference Stock and may thereafter, subject to the provisions of this Part III of Article FOURTH and of any restrictions contained in any resolution of the Board of Directors providing for the issue of any particular series of Preference Stock, be reissued in the same manner as other authorized but unissued Preference Stock."

"IV.

Subject to the prior and superior rights of the Preferred Stock, Second Preferred Stock and Preference Stock, and on the conditions set forth in the foregoing Parts I, II and III of this Article FOURTH or in any resolution of the Board of Directors providing for the issuance of any particular series of Preferred Stock, Second Preferred Stock, or Preference Stock, and not otherwise, such dividends (payable in cash, stock or otherwise) as may be determined by the Board of Directors may be declared and paid on the Common Stock from time to time out of any funds legally available therefor.

Subject to the provisions of Parts I, II and III of this Article FOURTH, the holders of the Common Stock shall be entitled to one vote for each share held at all meetings of the stockholders of the corporation.

After payment shall have been made in full to the holders of the Preferred Stock, Second Preferred Stock and Preference Stock in the event of any liquidation, dissolution or winding up of the

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affairs of the corporation, the remaining assets and funds of the corporation shall be distributed among the holders of the Common Stock according to their respective shares."

"V.

Ownership of shares of any class of the capital stock of the corporation shall not entitle the holders thereof to any preemptive right to subscribe for or purchase or to have offered to them for subscription or purchase any additional shares of capital stock of any class of the corporation or any securities convertible into any class of capital stock of the corporation, however acquired, issued or sold by the corporation, it being the purpose and intent that the Board of Directors shall have full right, power and authority to offer for subscription or sell or to make any disposal of any or all unissued shares of the capital stock of the corporation or any securities convertible into stock or any or all shares of stock or convertible securities issued and thereafter acquired by the corporation, for such consideration, not less than the par value of shares having a par value, in money or property, as the Board of Directors shall determine."

SECOND: That thereafter pursuant to resolutions of its Board of Directors, a special meeting of stockholders of said Corporation was duly called and held, at which meeting the holders of a majority of the stock of the Corporation entitled to vote, as required by statute, voted in favor of the foregoing amendment.

THIRD: That said amendment was duly adopted in accordance with the provisions of Section 242 of Title 8 of The Delaware Code.

FOURTH: That said amendment does not effect any change in the issued shares of said Corporation.

IN WITNESS WHEREOF, said Tenneco Inc. has caused its corporate seal to be hereunto affixed and this certificate to be signed by N. W. FREEMAN, President, and M. H. COVEY, Secretary, this .... day of July, 196?

TENNECO INC.

Tenneco Inc.
Corporate Seal
1947
Delaware

By .....
N. W. FREEMAN, *President*

By .....
M. H. COVEY, *Secretary*

Exhibit D

TENNECO INC.

ertificate of Designation, Preferences and Rights of Preference Stock by Resolution of the Board of Directors Providing for an Issue of ..... Shares of Preference Stock Designated "$5.50 Cumulative Convertible Preference Stock (convertible commencing July 1, 1969)"

We, ..., Vice President, and ....., Assistant Secretary, of nneco Inc. (hereinafter referred to as the "Corporation"), a corporation organized and existing under e General Corporation Law of the State of Delaware, in accordance with the provisions of Section 151 ereof, do HEREBY CERTIFY:

That pursuant to authority conferred upon the Board of Directors by the Certificate of Incorporation of d Corporation, as amended (hereinafter referred to as the "Certificate of Incorporation"), said Board of rectors at a meeting duly convened and held on ....., 1967, at which a quorum was present d acting throughout, adopted a resolution providing for the issuance of a series of Preference Stock, to be signated "$5.50 Cumulative Convertible Preference Stock (convertible commencing July 1, 1969)" which solution is as follows:

RESOLVED, That pursuant to the authority vested in the Board of Directors of the Corporation by the Certificate of Incorporation, the Board of Directors does hereby provide for the issue of a series of Preference Stock, without par value, of the Corporation, to be designated "$5.50 Cumulative Convertible Preference Stock (convertible commencing July 1, 1969)" (hereinafter referred to as the "Cumulative Convertible Preference Stock"), initially consisting of ..... shares, and to the extent that the designations, powers, preferences and relative and other special rights and the qualifications, limitations and restrictions of the Cumulative Convertible Preference Stock are not stated and expressed in the Certificate of Incorporation, does hereby fix and herein state and express such designations, powers, preferences and relative and other special rights and the qualifications, limitations and restrictions thereof, as follows (all terms used herein which are defined in the Certificate of Incorporation shall be deemed to have the meanings provided therein):

(1) The dividend rate on the Cumulative Convertible Preference Stock shall be $5.50 per annum; dividends on shares of the Cumulative Convertible Preference Stock shall accrue from the date of the issue thereof.

(2) The amounts which the holders of the Cumulative Convertible Preference Stock shall be entitled to receive in the event of a liquidation, dissolution, or winding-up of the affairs of the Corporation shall, in the event of a voluntary liquidation, dissolution or winding-up, be the respective amounts which they would be entitled to receive if on the date of such liquidation, dissolution or winding-up the shares of the Cumulative Convertible Preference Stock held by them had been redeemed by the Corporation in accordance with the provisions of Subdivision 4 of Part III of Article FOURTH of the Certificate of Incorporation at the prices set forth in paragraph (3) of this resolution, or if the Preference Stock shall not at the time be redeemable at the option of the Corporation, then at $110.00 per share, or, in the event of an involuntary liquidation, dissolution or winding-up, at $100.00 per share, plus in each case a sum equal to accrued and unpaid dividends to the date of payment.

(3) Commencing July 1, 1977, the Cumulative Convertible Preference Stock shall be redeemable in whole or in part at any time or from time to time at the option of the Corporation at the applicable

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prices set forth below; the sums payable upon the redemption thereof at the option of the Corporation (in addition to accrued and unpaid dividends) shall be

$110.00 per share if redeemed on or after July 1, 1977 and prior to July 1, 1978 or
$109.00 per share if redeemed on or after July 1, 1978 and prior to July 1, 1979 or
$108.00 per share if redeemed on or after July 1, 1979 and prior to July 1, 1980 or
$107.00 per share if redeemed on or after July 1, 1980 and prior to July 1, 1981 or
$106.00 per share if redeemed on or after July 1, 1981 and prior to July 1, 1982 or
$105.00 per share if redeemed on or after July 1, 1982 and prior to July 1, 1983 or
$104.00 per share if redeemed on or after July 1, 1983 and prior to July 1, 1984 or
$103.00 per share if redeemed on or after July 1, 1984 and prior to July 1, 1985 or
$102.00 per share if redeemed on or after July 1, 1985 and prior to July 1, 1986 or
$101.00 per share if redeemed on or after July 1, 1986 and prior to July 1, 1987 or
$100.00 per share if redeemed on or after July 1, 1987.

(4) (a) The Cumulative Convertible Preference Stock shall be convertible, at the option of the respective holders thereof, at any time commencing July 1, 1969 (or as to any Cumulative Convertible Preference Stock called for redemption, at any time prior to the close of business on the fifth day prior to the date fixed for such redemption), at the basic conversion rate (such rate being subject to adjustment as hereinafter provided) of 3.6 shares of Common Stock for each one share of Cumulative Convertible Preference Stock.

Any holder of Cumulative Convertible Preference Stock electing to convert shall deposit the certificates for Cumulative Convertible Preference Stock at the principal office of any Transfer Agent for the Cumulative Convertible Preference Stock with the form of written notice to the Corporation endorsed on such certificates of his election to convert such Cumulative Convertible Preference Stock into Common Stock duly filled out and executed. The conversion right in respect of any such Cumulative Convertible Preference Stock shall be deemed to have been exercised at the date on which the certificates therefor, with such notice of election duly filled out and executed, shall have been so deposited, and the person entitled to receive the Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such Common Stock on said date; *provided, however,* that the conversion right in respect of any certificate so deposited after the close of business on any day shall not be deemed to have been exercised until the next succeeding business day. The Corporation shall not be required, in connection with any such conversion, to issue a fraction of a share of its Common Stock nor to deliver any stock certificate representing a fraction thereof, but in lieu thereof, the Corporation will make a cash payment equal to such fraction multiplied by the market price of the Common Stock determined as hereinafter set forth. The market price of the Common Stock for the purpose of computing payments to be made for fractional shares shall be the closing sales price (or if there were no sales, the closing bid price) on the principal stock exchange on which the Common Stock is listed or, if the Common Stock is not so listed, the closing bid price on the New York over-the-counter market; such price shall be determined as of the close of business on the last full business day of each week and such price as so determined shall continue in effect during the next succeeding week.

(b) As soon as practicable, and in any event within ten business days after the date of conversion of any Cumulative Convertible Preference Stock into Common Stock, the Corporation shall deliver to the person entitled thereto, at the principal office of the Transfer Agent for the Cumulative Convertible Preference Stock at which such Cumulative Convertible Preference Stock shall have been presented for conversion, certificates representing the shares of Common Stock and the cash, if any, to which such person shall be entitled on such conversion. The Corporation, as a condition to the exercise of such rights of conversion, may require the payment of a sum equal to any transfer tax or other governmental charge (but not including any tax payable upon the issue of stock deliverable upon such conversion) that may be imposed or required by law upon any transfer incidental or prior thereto, or the submission of proper proof that the same has been paid.

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(c) The conversion rate from time to time in effect hereunder shall be subject to adjustment from time to time in the following instances:

(i) In case the Corporation shall at any time issue any of its Common Stock in subdivision of outstanding Common Stock, by reclassification or otherwise, the conversion rate then in effect shall be increased proportionately, and in like manner, in case of any combination of Common Stock, by reclassification or otherwise, the conversion rate then in effect shall be proportionately decreased;

(ii) In case the Corporation shall pay a dividend or make a distribution upon its Common Stock in Common Stock, then, in each such case, from and after the record date for determining the stockholders entitled to receive such dividend or distribution, the conversion rate then in effect shall be increased in proportion to the increase in the number of outstanding shares of Common Stock through such stock dividend or distribution;

(iii) In case the Corportion shall issue and sell any shares of its Common Stock in addition to the shares of Common Stock outstanding as of the date of this resolution (other than (A) shares issued upon the conversion of the presently issued and outstanding Second Preferred Stock of the Corporation but not including within this exception any shares of such Second Preferred Stock which may be reissued following redemption, conversion or reacquisition, or may be otherwise reissued, or (B) shares issued upon the conversion of the Cumulative Convertible Preference Stock, or (C) shares issued exclusively to officers and/or employees of the Corporation or its subsidiaries pursuant to options or agreements entered into with such officers or employees in connection with their employment or pursuant to an employees' stock purchase plan, or (D) shares issued upon the exchange of any of Tenneco Corporation's presently issued and outstanding $1.60 Cumulative Second Preferred Stock) at a price per share to the Corporation which shall be less than the then prevailing conversion price (as hereinafter defined) per share of Common Stock, the conversion rate in effect immediately prior to the issuance of such additional shares shall be increased to a conversion rate determined as follows: The sum of (a) the product of the number of shares of Common Stock outstanding immediately prior to the issue of such additional Common Stock multiplied by the then prevailing conversion price per share of such Common Stock, and (b) the aggregate consideration (before underwriting discounts and commissions and other expenses) received by the Corporation from the issue of such additional Common Stock, shall be divided by the number of shares of Common Stock to be outstanding immediately after such additional issue, and the resulting quotient shall be divided into 100, and the amount so obtained shall be the conversion rate prevailing after the date of issue of such additional Common Stock, unless and until subsequently changed or adjusted in accordance herewith; the term "conversion price" shall be an amount computed by dividing into $100 the number of shares of Common Stock into which one share of the Cumulative Convertible Preference Stock is convertible at the conversion rate then in effect; in case the Corporation shall issue or sell additional shares of Common Stock for a consideration other than cash, the consideration received by the Corporation for such additional shares of Common Stock shall for the purpose of the foregoing computation be deemed to be the value of such consideration as determined by the Board of Directors;

(iv) In case the Corporation shall grant any rights to subscribe to or options to purchase any shares of its Common Stock, which rights or options expire not more than ninety days after the date of issue thereof, no adjustment in the conversion rate shall be made until the expiration of such rights or options; the shares of Common Stock actually issued shall be deemed to have been issued and sold as of the date of the expiration of such rights or options as the basis for the adjustment set forth in subparagraph (iii) above but such adjustment shall not be made except to the extent that shares of Common Stock shall have been issued and sold at a price per share to the Corporation which shall be less than the then prevailing conversion price; the consideration received for such Common Stock shall be the amount received or receivable by the

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Corporation as consideration for the granting of the rights or options, plus the amount of any additional consideration paid or payable to the Corporation upon the exercise thereof;

(v) In case the Corporation shall grant or have outstanding any rights to subscribe to or options to purchase any shares of its Common Stock for a consideration less than the then prevailing conversion price (other than rights to subscribe referred to in subparagraph (iv) of this clause (c) and rights or options to purchase Common Stock issued to officers and/or employees of the Corporation or its subsidiaries pursuant to options or agreements entered into with such officers or employees in connection with their employment or pursuant to an employees' stock purchase plan), the conversion rate hereunder shall be adjusted in the manner and to the extent provided in subparagraph (iii) of this clause (c), as though all the shares of Common Stock called for by such rights or options had been then issued and sold for the then applicable consideration provided for in such rights or options, plus the amount, if any, paid or payable to the Corporation as consideration for the granting of such rights or options; *provided*, that if the subscription or purchase price for Common Stock provided for in such rights or options should by the terms thereof (other than provisions for adjustment of such prices of the general nature set forth in this clause (c)) change at any time, any adjustment theretofore made in the conversion rate hereunder on the basis of the granting of such rights or options shall be disregarded, and the effect of such granting of rights or options upon the conversion rate hereunder shall be recalculated; such recalculation of the conversion rate hereunder shall be made in accordance with, and if called for by, the provisions of subparagraph (iii) of this clause (c) and for such purpose the granting of such rights or options shall be deemed for the purposes of this clause (c) to be the issue, at the date of such change in the subscription or purchase price, of (A) an aggregate number of shares of Common Stock equal to the number of shares of Common Stock then called for by such rights or options then outstanding, for a consideration equal to the new aggregate subscription or purchase price of the Common Stock called for by the rights or options then outstanding plus the amount, if any, paid to the Corporation as consideration for the granting of the rights or options then outstanding, and (B) the number of shares of Common Stock theretofore issued pursuant to such rights or options for a consideration equal to the actual aggregate purchase price of such shares of Common Stock plus the amount, if any, paid or payable to the Corporation as consideration for the granting of the rights or options so exercised; upon the expiration of such rights or options, the conversion rate shall then be recalculated in accordance with the provisions of subparagraph (iii) of this clause (c) as though all shares of Common Stock issued pursuant to the exercise of such options and rights had been sold at such date of expiration at the aggregate purchase price actually received by the Corporation, disregarding any adjustments theretofore made pursuant to this subparagraph (v) with respect to such rights or options;

(vi) In case the Corporation shall issue any security which is convertible into its Common Stock (other than shares of the Cumulative Convertible Preference Stock or shares of its presently issued and outstanding Second Preferred Stock but not including within this exception any shares of such Second Preferred Stock which may be reissued upon redemption, conversion or reacquisition, or may be otherwise reissued), such issue of such other convertible security shall be deemed, for the purpose of this clause (c), to be an issue of an aggregate number of shares of Common Stock equal to the number of shares of Common Stock into which such other convertible security is convertible and for an aggregate consideration, if any, equal to the amount of consideration for which such other convertible security is issued by the Corporation plus the amount, if any, payable to the Corporation upon conversion of such convertible security, and from and after the date of issue of such other convertible security, an adjustment in the conversion rate hereunder shall be made in accordance with, and, if called for by, the provisions of subparagraph (iii) of this clause (c); *provided* that if the conversion rate of such other convertible security into Common Stock should by the terms thereof (other than provisions for adjustment of the conversion rate of the general nature set forth in this clause (c)) change at any time, any adjustment there-

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tofore made in the conversion rate hereunder on the basis of the issue of such other convertible security shall be disregarded and the effect of such issue of such other convertible security upon the conversion rate hereunder shall be recalculated; such recalculation of the conversion rate hereunder shall be made in accordance with, and if called for by, the provisions of subparagraph (iii) of this clause (c) and the issue of such other convertible security shall be deemed for the purposes of this clause (c) to be the issue, at the date of such change in conversion rate of such other convertible security, of (A) an aggregate number of shares of Common Stock equal to the number of shares of Common Stock into which such other convertible security then outstanding is convertible, for a consideration equal to the amount of consideration for which such other convertible security then outstanding was issued and sold by the Corporation plus the amount, if any, payable to the Corporation upon conversion of such convertible security, and (B) the aggregate number of shares of Common Stock theretofore issued upon conversion of such other convertible security for a consideration equal to the amount of consideration for which such other convertible security so converted was issued and sold by the Corporation plus the amount, if any, actually paid to the Corporation upon conversion of such convertible security; upon the expiration of the right to convert such other convertible security the conversion rate shall then be recalculated in accordance with the provisions of subparagraph (iii) of this clause (c) as though all shares of Common Stock issued upon conversion of such other convertible security had been sold at the date of expiration of such right to convert at the aggregate purchase price actually received by the Corporation, disregarding any adjustments made pursuant to this subparagraph (vi) with respect to such other convertible security;

(vii) Notwithstanding the foregoing provisions, no adjustment in the conversion rate need be made if such adjustment would amount to a change in such conversion rate of less than two one-hundredths (.02) of a share of Common Stock, and, for the purpose of reducing or eliminating fractions, the adjusted conversion rate as determined by any calculation as herein provided may be modified by an amount which shall not result in a change of more than one one-hundredth (.01) of a share of Common Stock in the conversion rate as so determined; *provided*, that the amount by which any adjustment is not made or is modified by reason of the provisions of this subparagraph (vii) shall be carried forward and taken into account at the time of any subsequent adjustment in the conversion rate; upon any adjustment of the conversion rate hereunder as aforesaid, the adjusted conversion rate shall continue in effect until another adjustment shall have been made; whenever the conversion rate hereunder shall be adjusted pursuant to the provisions of this clause (c), the Corporation shall forthwith mail a notice to each record holder of the Cumulative Convertible Preference Stock at his address appearing upon the stock transfer books, stating the adjusted conversion rate;

(viii) In case of any capital reorganization (other than in the cases referred to in subparagraph (i) of this clause (c)), or reclassification of the capital stock of the Corporation or in case of the consolidation or merger of the Corporation with another corporation there shall thereafter be deliverable upon the conversion of a share of the Cumulative Convertible Preference Stock (in lieu of the number of shares of Common Stock theretofore deliverable) the number of shares of stock or other securities or property to which the holder of the number of shares of Common Stock of the Corporation which would otherwise have been deliverable upon the conversion of such share of the Cumulative Convertible Preference Stock at the time would have been entitled upon such capital reorganization or reclassification of capital stock, consolidation or merger, and in any such case, appropriate adjustment shall be made in the application of the provisions herein set forth with respect to rights and interest thereafter of the holders of the Cumulative Convertible Preference Stock to the end that the provisions set forth herein shall thereafter be applicable, as nearly as possible, in relation to any shares or other property thereafter deliverable upon the conversion of the Cumulative Convertible Preference Stock;

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(ix) No adjustment is to be made upon conversion of the Cumulative Convertible Preference Stock for dividends accrued thereon or for dividends upon the Common Stock issuable upon such conversion; and

(x) Shares of Common Stock owned or held by or for the account of the Corporation shall be deemed to be issued and outstanding for the purposes of this paragraph (4).

(d) Whenever the conversion rate is required to be adjusted as provided in clause (c) the Corporation shall forthwith employ a firm of public accountants of recognized standing who shall compute the adjusted conversion rate in accordance with the provisions of clause (c) and shall prepare a certificate setting forth such adjusted conversion rate and showing in detail the facts upon which such adjustment is based, and such certificate shall forthwith be filed with the Transfer Agents for the Cumulative Convertible Preference Stock and thereafter (until further adjusted) the adjusted conversion rate shall be as set forth in said certificate.

(e) In each case where reference is made to the Common Stock of the Corporation in the foregoing provisions, unless a different intention is expressed, such reference is to the Common Stock of the Corporation as such stock exists at the date of the adoption of these provisions by the Board of Directors of the Corporation, or stock into which the same may be changed from time to time.

(f) In case at any time after June 30, 1969:

(i) the Corporation shall pay any dividend payable in shares upon its Common Stock or make any distribution (other than cash dividends) to the holders of its Common Stock; or

(ii) the Corporation shall offer for subscription pro rata to the holders of its Common Stock any additional shares of any class or any other rights; or

(iii) of any capital reorganization or reclassification of the shares of the Corporation or of the consolidation or merger of the Corporation with another corporation; or

(iv) of the voluntary dissolution, liquidation or winding-up of the Corporation;

then, and in any one or more of said cases, the Corporation shall cause at least ten days' prior notice to be mailed to the Transfer Agents for the Cumulative Convertible Preference Stock and for the Common Stock and to the holders of record of the outstanding Cumulative Convertible Preference Stock of the date on which (x) the books of the Corporation shall close, or a record be taken for such stock dividend, distribution or subscription rights, or (y) such capital reorganization, reclassification, consolidation, merger, dissolution, liquidation or winding up shall take place, as the case may be. Such notice shall also specify the date as of which holders of Common Stock of record shall participate in such dividend, distribution or subscription rights or shall be entitled to exchange their Common Stock for securities or other property deliverable upon such capital reorganization, reclassification, consolidation, merger, dissolution, liquidation, or winding-up, as the case may be.

(g) So long as any shares of the Cumulative Convertible Preference Stock shall remain outstanding and the holders thereof shall have the right to convert said shares in accordance with the provisions of this paragraph (4), the Corporation will at all times reserve from the authorized and unissued shares of its Common Stock a sufficient number of shares to provide for such conversions. As a condition precedent to the taking of any action which would cause an adjustment reducing the conversion price below the then par value of the shares of Common Stock issuable upon conversion of the Cumulative Convertible Preference Stock, the Corporation will take such corporate action as may be necessary in order that it may validly and legally issue full paid and non-assessable shares of such Common Stock at such adjusted conversion price.

(5) (a) Subject to the provisions of Parts I and II of Article FOURTH of the Certificate of Incorporation of the Corporation, the holders of Cumulative Convertible Preference Stock shall be entitled to one vote for each share held at all meetings of the stockholders of the Corporation.

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(b) Whenever, at any time or times, dividends payable on the Cumulative Convertible Preference Stock shall be in arrears in an aggregate amount equivalent to six full quarter-yearly dividends (in determining the amount of dividends in arrears, the full amount of the quarter-yearly dividend shall be included for each quarter-yearly dividend which was not paid in full), the holders of outstanding Cumulative Convertible Preference Stock shall have the exclusive right, voting separately and as a class, to elect two directors of the Corporation and the remaining directors shall be elected by the holders of the class or classes of stock entitled to vote therefor at each meeting of the stockholders held for the purpose of electing directors, until such time as all accrued and unpaid dividends on the Cumulative Convertible Preference Stock shall have been paid in full, at which time the right of the holders of the Cumulative Convertible Preference Stock to vote pursuant to the provisions of this clause (b) shall terminate, subject to revesting in the event of each and every subsequent default of the character and for the time above mentioned. During any period of time in which the holders of the Cumulative Convertible Preference Stock shall have the right to elect two directors of the Corporation as herein in this clause (b) provided, the voting right conferred upon the holders of such stock by clause (a) of this paragraph (5) shall be suspended with respect to the election of directors, but shall otherwise continue in effect.

At any time when voting rights shall, pursuant to the provisions of this clause (b), be vested in the Cumulative Convertible Preference Stock, the number of directors of the Corporation shall be not less than that number required so that two directors may be elected by the holders of the Cumulative Convertible Preference Stock and a proper officer of the Corporation shall, upon the written request of the holders of record of at least ten per cent (10%) in aggregate stated value of the Cumulative Convertible Preference Stock then outstanding, addressed to the Secretary of the Corporation, call a special meeting of holders of the Cumulative Convertible Preference Stock and of any other class or classes of stock having voting power with respect to the election of directors. Such meeting shall be held at the earliest practicable date at the place at which the last preceding annual meeting of the stockholders of the Corporation was held, but may be held at the time and place of the annual meeting if such annual meeting is to be held within 60 days after such voting rights shall be vested in the Cumulative Convertible Preference Stock. If such meeting shall not be called by the proper officer of the Corporation as required within 20 days after personal service of the said written request upon the Secretary of the Corporation, or within 20 days after mailing the same within the United States of America by registered mail addressed to the Secretary of the Corporation at its principal office (such mailing to be evidenced by the registry receipt issued by the postal authorities), then the holders of record of at least ten per cent (10%) in aggregate stated value of the Cumulative Convertible Preference Stock then outstanding may designate in writing one of their number to call such meeting, and such meeting may be called by such person designated upon the notice required for annual meetings of stockholders and shall be held at the place at which the last preceding annual meeting of the stockholders of the Corporation was held. Any holder of Cumulative Convertible Preference Stock so designated shall have access to the stock books of the Corporation for the purpose of causing a meeting of stockholders to be called pursuant to these provisions.

At any meeting so called, and at any other meeting of stockholders held for the purpose of electing directors at which the holders of the Cumulative Convertible Preference Stock shall have the right, voting separately and as a class, to elect directors as aforesaid, the presence in person or by proxy of one-third of the outstanding shares of the Cumulative Convertible Preference Stock shall be required to constitute a quorum of such class for the election of any director by the holders of the Cumulative Convertible Preference Stock voting as a class.

At any such meeting or adjournment thereof, (x) the absence of a quorum of the Cumulative Convertible Preference Stock shall not prevent the election of directors other than those to be elected by the Cumulative Convertible Preference Stock voting as a class and the absence of a quorum for the election of such other directors shall not prevent the election of the directors to be elected by the Cumulative Convertible Preference Stock voting as a class, and (y) in the absence of either or both

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such quorums, a majority of the holders present in person or by proxy of the stock or stocks wh... lack a quorum shall have power to adjourn the meeting for the election of directors which they a... entitled to elect from time to time without notice other than announcement at the meeting un... quorum shall be present.

The term of office of all directors in office at any time when voting power shall, as aforesa... become vested in the Cumulative Convertible Preference Stock, other than directors elected by hold... of Preferred Stock of the Corporation pursuant to Subdivision 5(A) of Part I of Article Four... of the Certificate of Incorporation of the Corporation, shall terminate upon the election of any ne... directors at any meeting of stockholders called for the purpose of electing directors. Upon any te... mination of the right of the holders of the Cumulative Convertible Preference Stock to vote fo... directors as a class as in this paragraph (5) provided, the term of office of all directors then in offi... other than directors elected by holders of Preferred Stock pursuant to Subdivision 5(A) of Pa... I of Article FOURTH of the Certificate of Incorporation of the Corporation, shall terminate upo... the election of new directors at a meeting of the class or classes of the Corporation then entitle... to vote for directors, which meeting may be held at any time after such termination of such votin... right of the Cumulative Convertible Preference Stock, upon notice as above provided, and shall b... called by the Secretary of the Corporation upon written request of the holders of record of ten pe... cent (10%) of the aggregate number of outstanding shares of such class or classes of stock the... entitled to vote for directors.

(6) Any shares of the Cumulative Convertible Preference Stock which shall have been converte... into Common Stock in accordance with the provisions of paragraph (4) or redeemed or otherwis... acquired shall assume the status of authorized but unissued Preference Stock and shall not be reissue... as shares of the Cumulative Convertible Preference Stock.

(7) The number of shares of Cumulative Convertible Preference Stock may, to the extent o... the Corporation's authorized and unissued Preference Stock (other than shares of such stock assum... ing the status of authorized but unissued Preference Stock pursuant to paragraph (6)), be... increased by further resolution duly adopted by the Board of Directors and the filing and recordin... of a certificate pursuant to the provisions of the General Corporation Law of the State of Delawar... stating that such increase has been so authorized.

(8) No shares of Preference Stock, in addition to the ..... shares designated herein as... Cumulative Convertible Preference Stock shall be issued as Cumulative Convertible Preference Stock... after June 30, 1969.

IN WITNESS WHEREOF said Tenneco Inc. has caused its corporate seal to be hereunto affixed and this... Certificate to be signed by ....., as Vice President, and ..... as Assistant Secretary, this ..... day of ....., 1967.

TENNECO INC.

Tenneco Inc.
Corporate Seal
1947
Delaware

By .....
Vice President

.....
Assistant Secretary

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Exhibit E, Annexed to Foregoing Affidavit

(Letter, Dated July 14, 1967 and Subsequent Letter, Dated July 25, 1967)

Occidental Petroleum Corporation
1509 West Wall, P. O. Box 3119
Midland, Texas 79701
Telephone Area Code 915 683-4711

July 14, 1967

Kern County Land Company
600 California Street
San Francisco, California 94108

Dear Sirs:

This letter is written to explain our position with respect to the consummation of the sale of assets of Kern County Land Company to a subsidiary of Tenneco Inc.

At the time of the announcement of the proposed KCL-Tenneco transaction, we were greatly disappointed that we had been unable to arrive at some common ground with KCL looking to a joining of KCL with Occidental. Accordingly, because of this and because of our substantial investment in KCL, our first reaction was to attempt to find out if our investment was in jeopardy and further to see whether a better proposal could be obtained by KCL for the benefit of its shareholders. On the basis of our examination of material concerning KCL available to the public, we concluded that Occidental could not offer KCL a more attractive proposal than that made by Tenneco. It also became apparent that we were going to become engaged in arduous, lengthy and expensive litigation if we attempted to obtain information concerning the value of KCL's assets which was not available to other KCL shareholders. Since Occidental had no more desirable offer to

make to the KCL Shareholders, it was clear that even if Occidental waged a costly and bitter proxy fight, it was unlikely that the KCL-Tenneco transaction could be stopped. Under the circumstances, Occidental did not consider it to be in its best interest, or the best interest of its shareholders, or the best interest of KCL Shareholders generally for it to approve the transaction. Accordingly, prior to the time that the Option Agreement was entered into between Tenneco Corporation and us, we had decided that we would not oppose the transaction.

In view of the fact that we would rather have worked out our own transaction with KCL, we shall not vote our KCL shares at the KCL Shareholder's Meeting on July 17, 1967.

This does not mean that we view the transaction as unfair or inequitable to a KCL Shareholder. Viewed solely in this light, we can say that if the form of the transaction were one in which we had a right of appraisal, we would not seek such right but would vote in favor of the sale of assets. We believe that ultimately the Tenneco Preference Stock that KCL is to receive will be worth more than the $105 per share option price agreed upon between Occidental and Tenneco Corporation.

We should also make it clear that while we will not oppose KCL's sale of assets to Tenneco, we do not know at this time whether we will want to oppose the dissolution of KCL after such sale.

We hope the foregoing explains our failure to vote at the KCL Shareholder's Meeting on July 17th.

Yours very truly,

OCCIDENTAL PETROLEUM CORPORATION

WRD:lc

By W. R. Davis
W. R. DAVIS
Executive Vice President

Exhibit E, Annexed to Foregoing Affidavit

OCCIDENTAL PETROLEUM CORPORATION
10889 Wilshire Boulevard, Suite 1500
Los Angeles, California 90024

879-1700 - 477-8521

July 25, 1967

Kern County Land Company
600 California Street
San Francisco, California 94108

Dear Sirs:

Please refer to our letter to you dated July 14, 1967. Inadvertently the next to the last sentence of the second paragraph of the letter contained an error. In such sentence obviously the word "approved" should be "opposed". This letter is written for the purpose of making such correction. The sentence in question should read "Under the circumstances, Occidental would not consider it to be in its best interest, or the best interest of its shareholders, or the best interest of KCL Shareholders generally for it to oppose the transaction."

Very truly yours,

Occidental Petroleum Corporation

By W. R. DAVIS
W. R. Davis, Executive Vice President

WRD:dp

Exhibit F, Annexed to Foregoing Affidavit

(Option Agreement of June 2, 1967)

CONFORMED EXECUTED

OPTION AGREEMENT

THIS AGREEMENT made in Jersey City, New Jersey, this 2nd day of June, 1967 between Tenneco Corporation, a Delaware corporation (hereinafter called "Tenneco"), and Occidental Petroleum Corporation, a California corporation (hereinafter called "Occidental"),

WITNESSETH:

WHEREAS, Occidental is, as of the date hereof, the beneficial owner of 886,623 shares of the common stock, of the par value of $2.50 per share, of Kern County Land Company, a California corporation (hereinafter called "Kern County");

WHEREAS, it is proposed to enter into an agreement and Plan of Reorganization (hereafter called the "Plan") whereby a wholly-owned subsidiary of Tenneco Inc., a Delaware corporation (hereinafter called "Tenneco Inc."), will purchase all of the assets of Kern County and under which shareholders of Kern County will receive shares of $5.50 Cumulative Convertible Preference Stock, without par value (hereinafter called the "Convertible Preference Stock") of Tenneco Inc. upon the liquidation of Kern County, subject to the due approval by the stockholders of Tenneco Inc. to the authorization and issuance of the Convertible Preference Stock, and the Board of Directors of Kern County have agreed to such proposal, subject to the due approval of the shareholders of Kern County;

Exhibit F, Annexed to Foregoing Affidavit

WHEREAS, Tenneco is desirous of obtaining an option to purchase, when and if issued, the shares of the Convertible Preference Stock of Tenneco Inc. to be received by Occidental upon the liquidation of Kern County pursuant to the Plan;

NOW, THEREFORE, in consideration of the covenants herein contained, Tenneco and Occidental hereby agree as follows:

1. Occidental hereby covenants, warrants and agrees that it owns beneficially, and has good and valid title to, 886,623 shares of capital stock, of the par value of $2.50 per share, of Kern County free and clear of all liens, encumbrances and equities of others;

2. Tenneco agrees to pay to Occidental the sum of $8,866,230 for the option granted under this Option Agreement; payment of $886,623 has been made contemporaneously with the execution of this Option Agreement and payment of the balance thereof is to be made by certified check in New York funds within five business days following the date hereof;

3. Occidental hereby grants to Tenneco an option to purchase, when and if issued, all of the shares of Convertible Preference Stock of Tenneco Inc. to be received by Occidental with respect to the 886,623 shares of capital stock of Kern County owned by Occidental in connection with the liquidation of Kern County at an aggregate price of $93,095,415 which price shall include the amount of $8,866,230 which Tenneco is paying for this option and shall be reduced by such amount;

4. Tenneco may exercise this option at any time after December 9, 1967 and (i) if the closing date of

the sale of assets pursuant to the Plan occurs prior to December 10, 1967, then said option shall expire on December 31, 1967, or (ii) if said closing date occurs on or after December 10, 1967 and prior to July 1, 1968, then said option shall expire on the thirtieth day after said closing date. This option shall be exercised by Tenneco by giving written notice to Occidental stating when delivery of the Convertible Preference Stock of Tenneco Inc. and payment of the aggregate amount to be paid to Occidental under Paragraph 3 hereof is to be made. In any event such payment shall be made by certified check within not less than three days or more than sixty days of the date on which Tenneco Inc. gives notice of its intention to exercise the option;

5. Upon the exercise of the option granted hereby, Occidental shall at the time of payment fixed in the notice referred to in Paragraph 4 transfer to Tenneco certificates for all of the shares of the Convertible Preference Stock of Tenneco Inc. covered by this Option Agreement which Occidental covenants, warrants and agrees shall be free and clear of all liens, encumbrances, and equities of others. The delivery of such shares of Convertible Preference Stock shall be made against payment therefor at the office of Wells Fargo Bank, 464 California Street, San Francisco, California;

6. It is contemplated by the parties hereto that Occidental will receive with respect to the Kern County stock owned by Occidental and to the Tenneco Inc. Convertible Preference Stock which is the subject matter of this Option Agreement, dividends with respect to the third and fourth quarters of 1967 and pro-rata with respect to each quarter, if any, in 1968 in which it shall be the record owner of such stock;

Exhibit F, Annexed to Foregoing Affidavit

7. In the event that the closing of the sale of assets contemplated by the Plan has not occurred prior to July 31, 1968 then the option granted hereby shall terminate and Occidental shall within five business days thereafter repay to Tenneco by certified check in New York funds, the amount which Tenneco has paid to Occidental under Paragraph 2 of this Option Agreement;

8. This Option Agreement and the rights of Tenneco hereunder shall be transferable by Tenneco but this Option Agreement and the shares of capital stock of Kern County referred to herein shall not be otherwise transferable except to a wholly-owned subsidiary of Occidental. In the event that because of the transfer or sale by Tenneco of the option granted hereunder and the subsequent sale of the Convertible Preference Stock, it is necessary that a registration statement under the Securities Act of 1933 become effective with respect to such Convertible Preferrence Stock and Occidental is deemed to be an underwriter with respect to such stock, Tenneco agrees to indemnify and hold Occidental harmless from any liability arising to Occidental because of being deemed an underwriter with respect to such stock; such indemnity agreement is to be in substantially the same form as the indemnity given by Tenneco Inc. to the underwriters in the last public offering of Tenneco Inc. securities;

9. Occidental agrees that it will mark the certificates for 886,623 shares of Kern County capital stock owned by it to reflect appropriately the existence of this Option Agreement;

Exhibit F, Annexed to Foregoing Affidavit

10: All notices and other communications under this agreement shall be sent to the parties as follows:

Tenneco	*Occidental*
C. B. Nourse, President Tenneco Corporation Wilmington, Delaware	D. L. Commons, Vice President Occidental Petroleum Corporation 10889 Wilshire Boulevard Los Angeles, California 90024

11. This agreement shall be construed in accordance with the laws of the State of New York;

12. This agreement constitutes the entire agreement between the parties hereto and may not be amended except in writing.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written, each intending to be legally bound hereby.

OCCIDENTAL PETROLEUM CORPORATION

By W. R. DAVIS
Executive Vice President

TENNECO CORPORATION

By ! ! ! ! ! !
Chairman of the Board

Exhibit G, Annexed to Foregoing Affidavit

(Assignment, Executed on August 30, 1967)

Know All Men By These Presents, that, Kern County Land Company, a California corporation (hereinafter called "Grantor"), pursuant to an Agreement and Plan of Reorganization dated as of June 1, 1967, among Grantor, Tenneco Inc., a Delaware corporation, and KCL Corporation, a Delaware corporation, for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations to it in hand paid by KCL Corporation, whose name has been changed to Kern County Land Company (hereinafter called "Grantee"), has Granted, Bargained, Sold, Transferred and Assigned and by these presents does Grant, Bargain, Sell, Transfer and Assign unto Grantee all claims, demands, rights and choses in action accrued or to accrue under and by virtue of the Securities Exchange Act of 1934 as Amended (15 U.S. Code §§ 78a-78jj, as amended), and all of the rules and regulations promulgated by the Securities and Exchange Commission to the date hereof.

To Have and To Hold all of such rights unto Grantee, its successors and assigns forever.

In Witness Whereof, Grantor has caused this instrument to be executed by its officers hereunto duly authorized on this the 30th day of August, 1967.

Kern County Land Company

By John ?
Vice President

Attest
? ? ? ?
Ass't. Secretary

Exhibit H, Annexed to Foregoing Affidavit

(Memorandum of August 30, 1967 and Exhibits Attached Thereto)

600 California Street
San Francisco, California
August 30, 1967

KERN COUNTY LAND COMPANY

Memorandum of Instructions for Wells Fargo Bank as Exchange Agent

1. Kern County Land Company, a California corporation ("Kern"), Tenneco Inc., a Delaware corporation ("Tenneco") and KCL Corporation, a Delaware corporation ("KCL"), have entered into an Agreement and Plan of Reorganization ("Plan") dated as of June 1, 1967, which provides, among other things, for the sale of the business and assets of Kern to KCL and the delivery by KCL to Kern of not in excess of 4,355,778 shares of a new series of the Preference Stock of Tenneco designated as the "$5.50 Cumulative Convertible Preference Stock (convertible commencing July 1, 1969)" (herein called "Tenneco Preference Stock").

2. Attached hereto as *Exhibit A* is a copy of resolutions adopted at a meeting of the Board of Directors of Kern held August 7, 1967, appointing Wells Fargo Bank as Exchange Agent ("the Exchange Agent"), to distribute shares of Tenneco Preference Stock to the holders of the Capital Stock of the par value of $2.50 per share of Kern at the rate of one share of such Preference Stock for each share of such Kern Capital Stock held, in connection with the liquidation of Kern, upon the surrender of certificates

for Kern Capital Stock in conformity with the provisions of the Plan, a conformed copy of which has heretofore been delivered to the Exchange Agent. By signing this Memorandum of Instructions the Secretary or Assistant Secretary of Kern certifies that the resolutions of the Board of Directors so attached were duly adopted by the Board of Directors of Kern at a meeting duly called and held on August 7, 1967, at which a quorum was present and acting throughout, and that said resolutions have not been modified, amended or rescinded, and are in full force and effect.

3. Pursuant to the Plan, KCL is on the Closing Date to deliver to Kern certificates evidencing 4,332,093 shares of Tenneco Preference Stock registered in the name of Kern. Kern will immediately surrender such certificates for Tenneco Preference Stock, duly endorsed, to Wells Fargo Bank, as transfer agent for Tenneco Preference Stock (herein in such capacity called the "Tenneco Transfer Agent") with instructions that the shares of stock represented by such certificates be transferred (in the manner set forth in the next paragraph) into the names of the holders of record of Kern Capital Stock.

The Tenneco Transfer Agent will forthwith issue and deliver to the Exchange Agent certificates for Tenneco Preference Stock, registered by The Bank of California, N.A., the California Registrar, representing the same number of shares as the certificates theretofore surrendered to it by Kern, which certificates will certify that the owners of the shares of Tenneco Preference Stock represented by such certificates are:

> "The shareholders of Kern County Land Company, a California corporation, as shown on the records of Wells Fargo Bank as Transfer Agent of said corporation, or their assignees."

Upon receipt of such certificates, the Exchange Agent will deposit such certificates with the Tenneco Transfer Agent for the account of the Exchange Agent, for the purpose of effecting the issuance of certificates for shares of Tenneco Preference Stock as requisitioned from time to time by the Exchange Agent.

The Exchange Agent is hereby authorized and empowered, in accordance with the procedure hereinafter set forth, to effect the distribution of certificates for Tenneco Preference Stock in appropriate denominations against the surrender, in complete cancellation and redemption, of certificates for shares of Kern Capital Stock registered in the names of the holders of record named on the records of Wells Fargo Bank as Transfer Agent of Kern County Land Company, such exchange to be at the rate of one share of Tenneco Preference Stock for each share of Kern Capital Stock.

4. Promptly after the close of business on the Closing Date, Kern will mail to each holder of record of Kern Capital Stock as shown on the books of its Transfer Agent a copy of the letter from the President and Chairman of the Board of Kern, annexed hereto as *Exhibit B*, together with a form of Letter of Transmittal annexed hereto as *Exhibit C* ("the Letter of Transmittal").

From time to time upon receipt of a duly executed Letter of Transmittal enclosing certificates for shares of Kern Capital Stock, the Exchange Agent will requisition from the Tenneco Transfer Agent certificates for the number of shares of Tenneco Preference Stock distributable in respect of the shares of Kern Capital Stock represented by the certificates enclosed with said Letter of Transmittal. The Exchange Agent will from time to time deliver to Kern for cancellation, or will cancel on behalf of Kern at

its request, all certificates for Kern Capital Stock surrendered to the Exchange Agent.

The Exchange Agent will thereupon deliver, in accordance with instructions in said Letter of Transmittal or the provisions hereof, the certificates so received from the Tenneco Transfer Agent. Each such delivery by mail shall be appropriately insured by the Exchange Agent.

5. All dividends payable in cash or stock, certificates issued evidencing stock splits, or other recapitalizations, and all other securities or property distributed with respect of Tenneco Preference Stock, the certificates evidencing which Preference Stock shall not have been claimed by the holders thereof by surrender of their certificates for Kern Capital Stock, shall be held by the Exchange Agent pending such exchange of Kern Capital Stock for Tenneco Preference Stock.

6. In performing its duties under this Memorandum of Instructions the Exchange Agent may consult with, and shall be entitled to rely upon, any instructions or directions furnished to it in writing by the President, any Vice President the Treasurer or the Secretary of Kern, but after June 30, 1968, or any earlier date which, in accordance with advice received by the Exchange Agent from Kern, is a date as of which the powers of said officers to act in behalf of Kern shall have expired, the Exchange Agent may consult with, and shall be entitled to rely upon, any instructions or directions furnished to it in writing by, the President, any Vice President, the Treasurer or the Secretary of KCL, whether such instructions or directions shall be in conformity with this Memorandum of Instructions or constitute a modification hereof or a supplement hereto; provided, however, that the Exchange Agent shall consult with, and shall be entitled to rely upon any instructions or directions furnished to it in writing by, the President, any

Vice President, the Treasurer or the Secretary of Tenneco with respect to the distribution of all dividends hereafter payable by Tenneco with respect to the shares of Tenneco Preference Stock, which at the close of business on the Closing Date are represented by the certificates issued this date under Section 3 hereof. The Exchange Agent shall be entitled to treat as genuine and as the document it purports to be, any letter, paper or other document when furnished it by any such officer.

7. Kern will reimburse the Exchange Agent for its expenses in acting hereunder and will compensate the Exchange Agent in accordance with the Exchange Agent's usual schedule of charges as previously disclosed to Kern and as the same may be reasonably modified from time to time. Kern will indemnify the Exchange Agent against, and hold it harmless from, all liability and expense (including attorneys' fees) which may arise out of or be incurred in connection with its acting in accordance with the provisions of this Memorandum of Instructions, as the same may be modified or supplemented from time to time, except for any liability or expense which shall arise out of the failure of the Exchange Agent to exercise due diligence under the circumstances involved or to act in good faith. KCL will perform each and every obligation of Kern under this Paragraph 7 not performed by Kern.

8. Promptly after the consummation of the transactions contemplated by the Plan the name of Kern will be changed to "600 California Corporation" and the name of KCL will be changed to "Kern County Land Company," (a Delaware corporation).

Exhibit H, Annexed to Foregoing Affidavit

9. The clarifications set out in your letter of August 16, 1967, in response to the August 7 draft of these instructions previously handed to you are hereby approved.

Dated: August 30, 1967.

KERN COUNTY LAND COMPANY
a California corporation

By (Signature Illegible)
Vice President

By (Signature Illegible)
Assistant Secretary

The foregoing Instructions are hereby approved:

TENNECO INC.,
a Delaware corporation

By CHARLES C. WEBB
Vice President

KCL CORPORATION
a Delaware corporation

By (Signature Illegible)
Secretary

The foregoing Instructions are accepted and the undersigned agrees to act in accordance therewith:

WELLS FARGO BANK,
as Exchange Agent

By (Signature Illegible)
By (Signature Illegible)

Exhibit H, Annexed to Foregoing Affidavit

(EXHIBIT A)

KERN COUNTY LAND COMPANY

BOARD OF DIRECTORS
RESOLUTIONS AUTHORIZING APPOINTMENT
OF EXCHANGE AGENT

RESOLVED, that Wells Fargo Bank hereby is appointed Exchange Agent for the Company for the purpose of distributing shares of $5.50 Cumulative Convertible Preference Stock of Tenneco Inc. to the holders of capital stock of the Company, in connection with the liquidation and dissolution of the Company, all in accordance with the terms and provisions of the Agreement and Plan of Reorganization between the Company, Tenneco Inc. and KCL Corporation dated as of June 1, 1967, and the action taken by the shareholders of the Company on July 17, 1967; and

FURTHER RESOLVED, that the President or any Vice President of the Company be and hereby is authorized to execute on behalf of the Company and deliver to Wells Fargo Bank a Memorandum of Instructions relating to action to be taken by said Bank as Exchange Agent, substantially in the form of the Memorandum of Instructions presented at this meeting, with such changes therein as the officer signing such Memorandum of Instructions may deem appropriate.

Exhibit H, Annexed to Foregoing Affidavit

(EXHIBIT B)

600 CALIFORNIA CORPORATION

(formerly)

(KERN COUNTY LAND COMPANY)
600 California Street
San Francisco, California 94108

August , 1967

Dear Share Owners:

The transfer of the assets and business of Kern County Land Company ("Kern") to KCL Corporation, the new, wholly-owned subsidiary of Tenneco Inc. ("Tenneco"), the change of Kern's name to "600 California Corporation", and the filing with the California Secretary of State of Kern's election to wind up and dissolve, all were completed today, as authorized by the share owners at the meeting held on July 17, 1967.

In accordance with the Agreement and Plan of Reorganization between Kern, Tenneco and KCL Corporation, you are now entitled to receive, upon surrender of your certificates for Kern Capital Stock, certificates for Tenneco $5.50 Cumulative Convertible Preference Stock (convertible after July 1, 1969) at the rate of one share of such Tenneco Preference Stock for each share of Kern Capital Stock held by you.

Certificates representing the aggregate number of shares of Tenneco Preference Stock to which all of our share owners are now entitled, have been deposited with Wells Fargo Bank, 464 California Street, San Francisco, as Exchange Agent, with irrevocable instructions for distribution of such shares to the Kern share owners upon receipt of their Kern stock certificates for cancellation and retirement.

Exhibit H, Annexed to Foregoing Affidavit

The procedure for surrendering your Kern certificates for exchange is set forth in the enclosed Letter of Transmittal and in the instructions on the reverse side thereof. You are urged promptly to forward your Kern certificates for exchange by filling out and signing the Letter of Transmittal and then delivering it or mailing it, together with such certificates, to Wells Fargo Bank, as Exchange Agent. As the instructions state, you should *not* endorse your Kern certificates unless you wish to have the new Tenneco certificate issued in some other name.

Kern has declared a final quarterly dividend of sixty-five cents per share, payable September 21, 1967, to share owners of record at the close of business August 14, 1967. Cancellation of your Kern stock certificates will in no way affect payment of this dividend.

Dividends on the Tenneco Preference Stock will accrue from September 30, 1967 at the rate of $5.50 per year per share, payable in quarterly installments on the first day of each calendar quarter. The first such dividend will be payable January 1, 1968. This dividend and any subsequent dividends or other distributions on your Tenneco Preference Stock will be paid to you only after surrender of your Kern certificates.

Kern has received a ruling from the Internal Revenue Service to the effect that, for federal income tax purposes, no gain or loss will be recognized to Kern share owners upon receipt of Tenneco Preference Stock in exchange for their Kern Capital Stock. Your tax basis for your Kern shares will be applicable to the shares of Tenneco Preference Stock to which you are entitled.

For the time being the Kern transfer books will remain open and the stock will continue to remain transferable. At a later date, however, after appropriate notice, the transfer books will be permanently closed. In due time the Kern stock will be removed from trading on the New York and Pacific Coast Stock Exchanges.

Exhibit H, Annexed to Foregoing Affidavit

It is anticipated that trading in the new shares of Tenneco Preference Stock will commence on the New York and Pacific Coast Stock Exchanges not later than December 31, 1967. We understand that there will be an "over-the-counter" market for such shares in the meantime.

The new Tenneco subsidiary, a Delaware corporation, has changed its name to "Kern County Land Company" and will continue the business of the company under that name.

Sincerely yours,

DWIGHT M. COCHRAN
President

GEORGE G. MONTGOMERY
Chairman of the Board

KERN COUNTY LAND COMPANY

Wells Fargo Bank, Exchange Agent
For Kern County Land Company
464 California Street

San Francisco

Gentlemen:

Pursuant to the letter of Kern County Land Company ("Kern") dated August , 1967 advising of the transfer of its assets to a wholly owned subsidiary of Tenneco Inc. ("Tenneco"), the undersigned herewith surrenders the certificates representing Kern Capital Stock listed below in exchange for certificates representing Tenneco $5.50 Cumulative Convertible Preference Stock (convertible after July 1, 1969) ("Tenneco Preference Stock") at the

rate of one such Tenneco share for each share of Kern, all as set forth below and on the reverse hereof:

Certificate Number(s)	*Number of Shares*
.....	.....
.....	.....
.....	.....

(Attach separate schedule, if necessary)

You are requested to issue the appropriate certificate for Tenneco Preference Stock in the name or names shown on the surrendered certificates unless other instructions are given in Box A.

Box A—[See paragraph A on reverse side]
Issue the new certificates in the name or names of:

Social Security No.

Name .....
(Please print or type)

Name .....
(Please print or type)

Address .....
(Number and Street)

.....
(City) (State) (Zip Code)

Exhibit H, Annexed to Foregoing Affidavit

Mail the new Certificates to the undersigned at the address shown on the records of the bank unless special delivery instructions are given in Box B.

Box B—[See paragraph B on reverse side]

☐ Mail New Certificates to:

☐ Hold New Certificates for delivery to:

Name .....
(Please print or type)

Address .....
(Number and Street)

.....
(City) (State) (Zip Code)

Dated ....., 1967

.....

.....
Signature of Shareholder or Shareholders

Name and Address of Shareholder as
Shown on the Records of the Bank:

[Printer: Please leave room for address stencil.]

Exhibit H, Annexed to Foregoing Affidavit

[Reverse side of Letter of Transmittal]

KERN COUNTY LAND COMPANY

INSTRUCTIONS TO SHARE OWNERS

This Letter of Transmittal, completely filled in and signed, together with the certificates described on the face hereof should be delivered or sent by mail to Wells Fargo Bank, Exchange Agent for Kern County Land Company, 464 California Street, San Francisco. The method of delivery of the certificates is at the option and risk of the holder. If certificates are sent by mail, it is recommended that they be sent by registered mail, properly insured. Certificates may be surrendered in person.

If the certificates for Tenneco shares are to be issued in the same name as that appearing on the face of the Kern certificates surrendered, no enforsement is required.

A. FOR HOLDERS DESIRING TRANSFER TO NEW HOLDER OF RECORD

If the certificates for Tenneco Preference Stock are to be issued in a name other than that which appears on the face of the Kern certificates surrendered, the Kern certificates must be duly endorsed or assigned by the registered holder to the person to whom the new certificates are to be issued. Box A should be filled in as required to direct such a change. Signatures to the endorsement or assignment must correspond exactly with the names which appear on the face of the certificate and must be guaranteed by a bank or trust company located or having a correspondent in the City of San Francisco, or by a firm having membership on the New York Stock Exchange or the Pacific Coast Stock Exchange.

If an endorsement or assignment is made by a corporation or association, by an attorney-in-fact, or by an execu-

tor, administrator, guardian, trustee or other person acting in a fiduciary or representative capacity, proper evidence of the authority to assign, sell and transfer shares should be forwarded with the surrendered certificates.

B. For Holders Desiring Different Delivery Procedure

If you wish your new certificates for Tenneco Preference Stock to be held for delivery to you in person at Wells Fargo Bank, Exchange Agent for Kern County Land Company, 464 California Street, San Francisco, or if you wish your certificates to be mailed to an address other than that shown on the records of the bank as indicated on the face of this Letter of Transmittal, use Box B for such special instructions. (Note: The instructions appearing in Box B will be considered applicable only to the delivery of new certificates and will not change your address on the records of the bank.)

August 16, 1967

Refer to Bier for Action

Kern County Land Company
600 California Street
San Francisco, California

Atten: Mr. Howard Hawkins, Secretary

Re: Memorandum of Instructions for Wells Fargo Bank as Exchange Agent—Instruction No. 1

Gentlemen:

Please refer to your Memorandum of Instructions for Wells Fargo Bank as Exchange Agent ("Instructions"),

Exhibit H, Annexed to Foregoing Affidavit

dated August 7, 1967 and approved by Tenneco, Inc. and KCL Corporation. The terms which are defined in the Instructions are used herein as there defined.

Pursuant to paragraph 6 of the Instructions the Transfer Agent wishes to confirm oral instructions which it has received from a representative of Kern clarifying its duties and obligations under paragraph 4 of the Instructions.

(a) It is understood that Kern is to be directly responsible for the mailing of the letter from the President and Chairman of the Board of Kern to each holder of record of Kern Capital Stock after the close of business on the Closing Date. It is further understood that there may be a reasonable delay in posting all transfers of Kern Capital Stock taking place prior to and during the Closing Date.

(b) On the top of page 3 of the Instructions it is provided that from time to time "upon receipt of a duly executed Letter of Transmittal enclosing certificates for shares of Kern Capital Stock", the Exchange Agent will requisition from the Tenneco Transfer Agent certain shares of Tenneco Preference Stock. It is understood that the Letter of Transmittal must be signed, or at least purport to be signed, by all of the holders of record of the Kern Capital Stock submitted therewith. The Exchange Agent will return to sender Letters of Transmittal which do not appear to be signed by all of the holders of record with the request that they be so signed. The Exchange Agent is not required to obtain any proof or authentication of the signature or signatures appearing on the Letters of Transmittal.

(c) Though the Instructions provide that the Exchange Agent will from time to time deliver to Kern for cancellation, or will cancel on behalf of Kern at its request, all

certificates for Kern Capital Stock surrendered to the Exchange Agent, it is understood that the Exchange Agent will transfer such certificates to the Transfer Agent for cancellation in accordance with Kern's instructions.

If the foregoing is correct, please return the enclosed copy of this letter, signed by the President, any Vice President, the Treasurer or the Secretary of Kern. When so signed and returned, the foregoing will constitute Kern's supplemental instructions and directions given pursuant to paragraph 6 of the Instructions.

Very truly yours,

WELLS FARGO BANK

By .....
Vice President

KERN COUNTY LAND COMPANY hereby agrees to the foregoing supplemental instructions and directions given pursuant to paragraph 6 of the "Instructions" referred to therein.

Dated: ....., 1967.

KERN COUNTY LAND COMPANY

By .....

Its .....

Exhibit I, Annexed to Foregoing Affidavit

(Certificate of Election, Executed August 30, 1967)

KERN COUNTY LAND COMPANY

Certificate of Election to Wind Up and Dissolve

The undersigned, Dwight M. Cochran and Howard G. Hawkins, Jr., hereby certify:

(a) That they are and at all times herein mentioned have been the duly elected President and Secretary, respectively, of Kern County Land Company, a California corporation;

(b) That said corporation has elected to wind up and dissolve; and

(c) That said election to wind up and dissolve was made by the vote of the shareholders of the corporation at a meeting duly called, noticed and held at 10:30 o'clock in the forenoon on Monday, July 17, 1967; that the number of shares voting for said election was 3,039,190 shares; and that the total number of outstanding shares, the holders of which were entitled to vote on or consent to said election is 4,330,440 shares.

In Witness Whereof, the undersigned have executed this certificate this 30 day of August, 1967.

Dwight M. Cochran
Dwight M. Cochran
President

[Corporate Seal]

H. G. Hawkins, Jr.
Howard G. Hawkins, Jr.
Secretary

Exhibit J, Annexed to Foregoing Affidavit

Each of the undersigned declares under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of August, 1967 at San Francisco, California.

Dwight M. Cochran
(DWIGHT M. COCHRAN)

H. G. Hawkins, Jr.
(HOWARD G. HAWKINS, JR.)

FILED
In the office of the Secretary of State
of the State of California
August 30, 1967
FRANK H. JORDAN, Secretary of State
By ! ! ! ! JOHNSON
Deputy

Exhibit J, Annexed to Foregoing Affidavit

(LETTER, DATED AUGUST 31, 1967 AND ATTACHMENTS)

600 CALIFORNIA CORPORATION
formerly
KERN COUNTY LAND COMPANY
600 California Street
San Francisco, California 94108

August 31, 1967

DEAR SHARE OWNERS:

The transfer of the assets and business of Kern County Land Company ("Kern") to KCL Corporation, the new, wholly-owned subsidiary of Tenneco Inc. ("Tenneco"), the change of Kern's name to "600 California Corpora-

tion", and the filing with the California Secretary of State of Kern's election to wind up and dissolve, all were completed yesterday, as authorized by the share owners at the meeting held on July 17, 1967.

In accordance with the Agreement and Plan of Reorganization between Kern, Tenneco and KCL Corporation, you are now entitled to receive, upon surrender of your certificates of Kern Capital Stock, certificates for Tenneco $5.50 Cumulative Convertible Preference Stock (convertible after July 1, 1969) at the rate of one share of such Tenneco Preference Stock for each share of Kern Capital Stock held by you.

Certificates representing the aggregate number of shares of Tenneco Preference Stock to which all of our shares owners are now entitled, have been deposited with Wells Fargo Bank, San Francisco, as Exchange Agent, with irrevocable instructions for distribution of such shares to the Kern share owners upon receipt of their Kern stock certificates for cancellation and retirement.

The procedure for surrendering your Kern certificates for exchange is set forth in the enclosed Letter of Transmittal and in the instructions on the reverse side thereof. You are urged promptly to forward your Kern certificates for exchange by filling out and signing the Letter of Transmittal and then delivering it or mailing it, together with such certificates, to Wells Fargo Bank, as Exchange Agent. As the instructions state, you should *not* endorse your Kern certificates unless you wish to have the new Tenneco certificate issued in some other name.

Kern's final quarterly dividend of sixty-five cents per share is payable September 21, 1967, to share owners of record at the close of business August 14, 1967. Cancellation of your Kern stock certificates will in no way affect payment of this dividend.

Dividends on the Tenneco Preference Stock will accrue from September 30, 1967 at the rate of $5.50 per year per

share, payable in quarterly installments on the first day of each calendar quarter. The first such dividend will be payable January 1, 1968, by Houston National Bank as dividend disbursing agent. *This dividend and any subsequent dividends or other distributions on your Tenneco Preference Stock will be paid to you only after surrender of your Kern certificates.*

Kern has received a ruling from the Internal Revenue Service to the effect that, for federal income tax purposes, no gain or loss will be recognized to Kern share owners upon receipt of Tenneco Preference Stock in exchange for their Kern Capital Stock. Your tax basis for your Kern shares will be applicable to the shares of Tenneco Preference Stock to which you are entitled.

For the time being the Kern transfer books will remain open and the stock will continue to remain transferable. At a later date, however, after appropriate notice, the transfer books will be permanently closed. In due time the Kern stock will be removed from trading on the New York and Pacific Coast Stock Exchanges.

As stated in our letter of August 18, it is expected that the Tenneco Preference Stock will be listed on the New York and Pacific Coast Stock Exchanges by December 31, 1967. We understand that there will be an "over-the-counter" market for such shares in the meantime.

The new Tenneco subsidiary, a Delaware corporation, is changing its name to "Kern County Land Company" and will continue the business of the company under that name.

Sincerely yours,

Dwight M. Cochran	Geo. G. Montgomery
DWIGHT M. COCHRAN	GEO. G. MONTGOMERY
President	*Chairman of the Board*

Exhibit J, Annexed to Foregoing Affidavit

LETTER OF TRANSMITTAL
To Accompany Certificates Representing Shares of Capital Stock of
KERN COUNTY LAND COMPANY

WELLS FARGO BANK, Exchange Agent for Kern County Land Company
450 Mission Street, San Francisco, California 94120

Gentlemen:

Pursuant to the letter of Kern County Land Company ("Kern") dated August 31, 1967 advising of the transfer of its assets to a wholly owned subsidiary of Tenneco, Inc. ("Tenneco"), the undersigned herewith surrenders the certificates representing Kern Capital Stock listed below in exchange for certificates representing Tenneco $5.50 Cumulative Convertible Preference Stock (convertible after July 1, 1969) ("Tenneco Preference Stock") at the rate of one such Tenneco share for each share of Kern, all as set forth below and on the reverse hereof:

Certificate Number(s)	Number of Shares
.....	.....
.....	.....
.....	.....

(Attach separate schedule, if necessary)

You are requested to issue the appropriate certificates for Tenneco Preference Stock in the name or names shown on the surrendered certificates unless *other* instructions are given in Box A.

Box A—[See paragraph A on reverse side]
Social Security No. .....

Exhibit J, Annexed to Foregoing Affidavit

Issue the new certificates in the name or names of:

Name .....
(Please print or type)

Name .....
(Please print or type)

Address .....
(Number and Street)

.....
(City) (State) (Zip Code)

Mail the new certificates to the undersigned at the address entered under the signature(s) below *unless* special instructions are given in Box B.

Box B—[See paragraph B on reverse side]

Hold new certificates for delivery to:

Name .....
(Please print or type)

Address .....
(Number and Street)

.....
(City) (State) (Zip Code)

Sign exactly as name appears on Kern stock certificates →

.....

.....

Signature(s) of Shareholder(s)

Exhibit J, Annexed to Foregoing Affidavit

Address to which new Tenneco Preference Stock Certificates are to be mailed (please print or type):

Address .....
(Number and Street)

.....
(City)

.....
(State) (Zip Code)

Dated ....., 1967

KERN COUNTY LAND COMPANY

INSTRUCTIONS TO SHARE OWNERS

This Letter of Transmittal, completely filled in and signed, together with the certificates described on the face hereof should be delivered or sent by mail to Wells Fargo Bank, Exchange Agent for Kern County Land Company, 450 Mission Street, San Francisco, California 94120. The method of delivery of the certificates is at the option and risk of the holder. If certificates are sent by mail, it is recommended that they be sent by registered mail, properly insured. Certificates may be surrendered in person.

If the certificates for Tenneco shares are to be issued in the same name as that appearing on the face of the Kern certificates surrendered, no endorsement is required.

A. FOR HOLDERS DESIRING TRANSFER TO NEW HOLDER OF RECORD

If the certificates for Tenneco Preference Stock *are to be issued in a name other than that which appears on the face*

of the Kern certificates surrendered, the Kern certificates must be duly endorsed or assigned by the registered holder to the person to whom the new certificates are to be issued. Box A should be filled in as required to direct such a change. Signatures to the endorsement or assignment must correspond exactly with the names which appear on the face of the certificate and must be guaranteed by a bank or trust company located or having a correspondent in the City of San Francisco, or by a firm having membership on the New York Stock Exchange or the Pacific Coast Stock Exchange.

If an endorsement or assignment is made by a corporation or association, by an attorney-in-fact, or by an executor, administrator, guardian, trustee or other person acting in a fiduciary or representative capacity, proper evidence of the authority to assign, sell and transfer shares should be forwarded with the surrendered certificates.

B. For Holders Desiring Different Delivery Procedure

If you wish your new certificates for Tenneco Preference Stock to be held for delivery to you in person at Wells Fargo Bank, Exchange Agent for Kern County Land Company, 450 Mission Street, San Francisco, use Box B for such special instructions.

Exhibit K, Annexed to Foregoing Affidavit

(Certificate of Dissolution, Filed October 6, 1967)

STATE OF CALIFORNIA

(Seal)

Department of State

To all whom these presents shall come, Greetings:

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That the annexed transcript has been compared with the Record on file in my office, of which it purports to be a copy, and that the same is full, true and correct.

In testimony whereof, I, Frank M. Jordan, Secretary of State, have hereunto caused the Great Seal of the State of California to be affixed and my name subscribed, at the City of Sacramento, in the State of California, Oct. 6, 1967.

Frank M. Jordan
Secretary of State

By H. P. (Illegible)
Assistant Secretary of State

CERTIFICATE OF WINDING UP AND DISSOLUTION

Certificate That 600 California Corporation
A California Corporation
Has Been Completely Wound Up and Dissolved

The undersigned hereby do certify as follows:

1. We are a majority of the authorized number of the directors of 600 California Corporation, a California corporation.

Exhibit K, Annexed to Foregoing Affidavit

2. 600 California Corporation has been completely wound up.

3. All known debts and liabilities of 600 California Corporation have been adequately provided for in that Kern County Land Company, a Delaware corporation qualified to do business in the State of California and having as its address 600 California Street, San Francisco, California 94108, has assumed all such debts and liabilities except for certain expenses of reorganization and dissolution which Wells Fargo Bank, a California corporation having as its address 464 California Street, San Francisco, California 94120, has agreed to pay.

4. All known assets of 600 California Corporation have been distributed to the shareholders of the corporation.

5. This Certificate may be executed in any number of counterpart originals, all of which shall be taken together to constitute one instrument.

IN WITNESS WHEREOF, we have executed this Certificate this 5th day of October, 1967.

BURNHAM ENERSEN

HERBERT L. REID

JOHN M. PRESTON

PORTER SESNON

E. C. ARBUCKLE

CHARLES A. ANDERSON

FRED A. DAVIES

LOUIS LEE HAGGIN II

PETER COOK, JR.

DWIGHT M. COCHRAN

GEO. G. MONTGOMERY

Exhibit K, Annexed to Foregoing Affidavit

Burnham Enersen, Herbert L. Reid, John M. Preston, Porter Sesnon, Ernest C. Arbuckle, Charles A. Anderson, Fred A. Davies, Louis Lee Haggin II, Peter Cook, Jr., Dwight M. Cochran, Geo. G. Montgomery and , being a majority of the Board of Directors of 600 California Corporation, a California corporation, do each of them say:

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of October, 1967, at San Francisco, California.

Burnham Enersen

Herbert L. Reid

John M. Preston

Porter Sesnon

E. C. Arbuckle

Charles A. Anderson

Fred A. Davies

Louis Lee Haggin II

Peter Cook, Jr.

Dwight M. Cochran

Geo. G. Montgomery

Exhibit L, Annexed to Foregoing Affidavit

(Letter of Transmittal, Dated December 11, 1967)

Letter of Transmittal
To Accompany Certificates Representing
Shares of Capital Stock of
Kern County Land Company

Wells Fargo Bank, Exchange Agent
for Kern County Land Company
450 Mission Street
San Francisco, California 94120

Gentlemen:

Pursuant to the Letter of Kern County Land Company ("Kern") dated August 31, 1967 advising of the transfer of its assets to a wholly owned subsidiary of Tenneco Inc. ("Tenneco"), the undersigned herewith surrenders the certificates representing Kern Capital Stock listed below in exchange for certificates representing Tenneco $5.50 Cumulative Convertible Preference Stock (convertible after July 1, 1969) ("Tenneco Preference Stock") at the rate of one such Tenneco share for each share of Kern, all as set forth below and on the reverse hereof.

Certificate Number	*Number of Shares*
SB1546	776
NB371	732,700
SB1541	125,304
SB1496	26,869
N98547	100
N98548	100
N98549	100
N98550	100

Exhibit L, Annexed to Foregoing Affidavit

Certificate Number	*Number of Shares*
N98551	100
N98552	100
N98553	100
N98554	100
N98555	100
N98556	100
N98557	100
N98558	100
N98559	100
N98560	100
N98561	100
N98562	100
N98563	100
N98564	100
N98565	100

You are requested to issue the certificates for Tenneco Preference Stock to Occidental Petroleum Corporation and deliver a certificate in the amount of 886,623, shares and another certificate for 926 shares to the undersigned at the meeting at which this letter of transmittal is delivered to you.

Dated: December 11, 1967.

OCCIDENTAL PETROLEUM CORPORATION

By D. L. Commons
D. L. COMMONS
Vice President

Exhibit M, Annexed to Foregoing Affidavit

(RECEIPT, DATED DECEMBER 11, 1967)

(PHOTOSTAT)

(See opposite ☛)

EXHIBIT M, ANNEXED to FOREGOING AFFIDAVIT

7371 36A

WELLS FARGO BANK

STOCK TRANSFER DEPARTMENT

DELIVERED TO: MR. DANFORTH, VICE PRESIDENT FOR: SPECIAL ASS.

CERTIFICATE (S) OF STOCK AS FOLLOWS:

NAME:	STOCK:	JOURNAL #:	DATE:	SHARES:
[illegible] PETROLEUM CORPORATION [illegible]	SU 1734 SU 1735	no #	12/11/67	006631 000926
			TOTAL	007549

TOTAL: _____

CERTIFICATE (S) ENCLOSED BY: H STOCKER ON 12-7-67

Stock Div. Supervisor Transfer Department

RECEIVED BY: [signature] Vice President ON 12-11-67

RETURNED TO W.F.B. ON _____ BY _____

RECEIVED BY W.F.B. REGISTRATION UNIT ON _____ BY _____

PLFF'S Tennero
DEFT'S EXH. 202, id.
C. A. MICHAELINI, C.S.R.

6-27-69

NK PAGES

Exhibit N, Annexed to Foregoing Affidavit

(Order of Dismissal in Knox County Proceeding, Entered September 14, 1968)

IN THE DISTRICT COURT OF KNOX COUNTY, TEXAS

No. 5961

Harjean Company,

vs.

Kern County Land Company, et al.

Motion to Dismiss

To the Honorable Judge of Said Court:

Now Comes Plaintiff, Harjean Company, and respectfully moves the Court to dismiss the above entitled and numbered cause with prejudice, at Plaintiff's cost for the reason that Plaintiff does not desire to further prosecute such cause.

Wherefore, Plaintiff prays that this suit be dismissed, with prejudice to refiling same, at Plaintiff's cost.

Crenshaw, Dupree & Milam
P. O. Box 1499
Lubbock, Texas 79408
Tom S. Milam
Attorneys for Plaintiff

Exhibit N, Annexed to Foregoing Affidavit

ORDER.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled and numbered cause be and it is hereby dismissed with prejudice, at Plaintiff's costs, and it appearing that all costs have been paid, no execution shall issue.

Entered and signed this the 14th day of September, A.D., 1968.

(Signature Illegible)
Judge of District Court of
Knox County, Texas

THE STATE OF TEXAS }
COUNTY OF KNOX } ss.:

I, ZENA H. WALDRON, Clerk of the District Court of Knox County, Texas, do hereby certify that the foregoing is a true and correct copy of the original Motion & Order to Dismiss in Cause No. 5961, styled: Harjean Company vs. Kern County Land Company, et al., as the same appears on file in my office.

GIVEN UNDER MY HAND and the seal of said Court, at office in Benjamin, Texas, this 14th day of September, 1968.

ZENA H. WALDRON
Clerk

Exhibit O, Annexed to Foregoing Affidavit

(Order of Judge Brewster, Entered July 24, 1969)

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Texas

Fort Worth Division

Civil Action No. CA-4-902

600 California Corporation, Formerly Kern County Land Company,

Plaintiff,

vs.

Harjean Co., Also Known as Harjean Company,

Defendant.

Order for Permanent Injunction

Be It Remembered that on this the 24th day of July, A.D. 1969, came on to be heard plaintiff's motion for permanent injunction, proper notice of such hearing having been given to all attorneys of record.

Whereupon the Court, without a jury, in an evidentiary hearing, after considering the pleadings, the evidence and the argument of counsel, is of the opinion that a permanent injunction should be granted in the terms hereinafter set out.

It Is, Therefore, Decreed that the defendants, Harjean Co., CMC Corp., George T. Conly and A. Wayne Peters, and all other shareholders of plaintiff, their officers, direc-

tors, agents, servants, employees, attorneys and partners, and all persons in active concert or participation with them or any of them, and all persons, firms or corporations who receive actual notice of this order, by personal service or otherwise, be and they are hereby permanently restrained and enjoined, as follows:

A. From further appearing in, prosecuting or taking any other action, direct or indirect, except for the purpose of dismissing any actions heretofore filed wherein injunction in any form is sought, seeking to bar, protest, or rescind the closing of the Plan of Reorganization dated June 1, 1967, between plaintiff (then named Kern County Land Company), Tenneco Inc. and KCL Corp.; and

B. From directly or indirectly initiating any legal action, procedure or procedures before any court or administrative body or officer, with the purpose or effect of interfering with, protesting of, or rescinding the closing and consummation of the said Agreement and Plan of Reorganization; and

C. From directly or indirectly, through any means whatsoever, attempting to set aside or void the closing of the said Agreement and Plan of Reorganization; and

D. From directly or indirectly in any way or manner attempting to cause the plaintiff herein, or any other person, firm or corporation, to return to the status quo existing prior to the closing of the said Agreement and Plan of Reorganization; and

E. From directly or indirectly prosecuting any legal action or proceeding before any court or administrative body or officer for the purpose or effect of interfering with the closing and consummation

of the said Agreement and Plan of Reorganization, or in anywise attempting to void the closing and consummation of such Plan;

F. From directly or indirectly instituting or prosecuting any action designed to obtain punitive or coercive judicial action in the nature of contempt proceedings or otherwise, against any person, firm or corporation by reason of their actions in the closing of the Agreement and Plan of Reorganization.

No bond is required in connection with the issuance of this permanent injunction, and the bond heretofore posted in connection with the temporary restraining order heretofore granted is no longer necessary, and any liability under such bond is hereby terminated and such bond may be cancelled.

SIGNED AND ENTERED this the 24th day of July, 1969.

(s) LEO BREWSTER
Judge

Exhibit P, Annexed to Foregoing Affidavit

(Letter, Dated August 16, 1967 with Enclosures Attached Thereto)

Phillips, Nizer, Benjamin, Krim & Ballon
1501 Broadway
New York, N. Y. 10036
Attorneys

August 16, 1967

New York Stock Exchange
14 Wall Street
New York, New York

Attention: Mr. Phillip West, Vice President
Department of Stock Listing

Re: Kern County Land Co.—Tenneco, Inc.—
Occidental Petroleum Corporation

Dear Mr. West:

Enclosed herewith is letter which we have submitted on behalf of Occidental in connection with the above entitled matter.

Kindly acknowledge receipt thereof by your office by executing a copy of the letter where indicated.

Thank you for your courtesy in this matter.

Very truly yours,

Phillips, Nizer, Benjamin, Krim & Ballon
By: Melvin Katz
Melvin Katz

MK.hc

Exhibit P, Annexed to Foregoing Affidavit

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
1501 Broadway
New York, N. Y. 10036
Attorneys

August 15, 1967

New York Stock Exchange
14 Wall Street
New York, New York

Attention: Mr. Phillip West, Vice President
Department of Stock Listing

Re: Kern County Land Co.—Tenneco, Inc.—
Occidental Petroleum Corporation

Dear Mr. West:

We are writing to you on behalf of our client, Occidental Petroleum Corporation ("Occidental"), and to confirm our telephone conversation of Friday, August 11, 1967, with respect to the above matter.

As you are aware, Kern County Land Co. ("Kern") and Tenneco, Inc. ("Tenneco") are parties to an agreement whereby a subsidiary of Tenneco is to acquire the assets of Kern in exchange for issuance of a new series of $5.50 Cumulative Convertible Preference Stock ("Tenneco Preferred Stock"). Under that agreement, the new Tenneco Preferred Stock will be exchanged on a share-for-share basis for all of the outstanding shares of capital stock of Kern upon the liquidation of the latter.

Occidental is a substantial shareholder of Kern which owns approximately 20.5% of the outstanding shares of capital stock of Kern as of this date. These shares were acquired by Occidental during May and June 1967 at a cost of approximately $75,400,000 pursuant to a tender

offer. After Kern entered into the agreement with Tenneco respecting the exchange of Kern assets for Tenneco Preferred Stock, Occidental granted an option to Tenneco Corporation, a subsidiary of Tenneco, to purchase 886,623 shares of the new Tenneco Preferred Stock to be issued to Occidental pursuant to the Tenneco-Kern reorganization at a price of $105 per share. Tenneco paid Occidental the sum of $8,886,230 in consideration of this option, which sum is to be credited against the purchase price for such shares if the option is exercised. The option is exercisable after December 9, 1967 and expires either on December 31, 1967 if the exchange of Kern's assets for Tenneco Preferred Stock closes prior to December 10, 1967 or on the 30th day following the closing date of that transaction if such closing occurs on or after December 10, 1967. The option terminates and the consideration received by Occidental must be returned to Tenneco in the event the closing between Kern and Tenneco does not occur by July 31, 1968.

We have been advised that, at the time the option was executed, Tenneco verbally agreed with Occidental that Tenneco would delay the listing of the new Tenneco Preferred Stock on the New York Stock Exchange until after the date upon which the option is either exercised or expires. Based upon this contractual understanding, Occidental agreed to dismiss voluntarily certain actions which Occidental had theretofore instituted against Kern. A copy of letters from Occidental's counsel reflecting this agreement are enclosed herewith for your information. In the absence of such an agreement, Occidental would be, and still is, confronted with a serious potential problem under Section 16(b) of the Securities Exchange Act of 1934, as amended (the " '34 Act"), which might well require that Occidental pay over to Tenneco, the issuer, any profits derived from the combination of a purchase of the Tenneco Preferred Stock (deemed to have occurred upon the dis-

tribution of such stock to Kern shareholders upon the liquidation of Kern) and the sale of such Tenneco Preferred Stock in the event of the exercise by Tenneco of the option described herein.[1]

At the time that Tenneco and Occidental discussed the option described herein, the parties were aware of the potential problem confronting Occidental under Section 16(b) of the '34 Act. By reason of their awareness of this problem, Tenneco agreed to cooperate with Occidental in order to avoid a harsh and unfair liability to Occidental and, consistent with this cooperation, agreed to delay the registration under Section 12(b) of the '34 Act and the listing of the Tenneco Preferred Stock on the New York Stock Exchange accordingly. Since the dates of these transactions, however, Occidental has experienced considerable difficulties in its dealings with Tenneco with respect to these matters. These difficulties have regrettably obliged Occidental to conclude that, in the absence of cooperation from Tenneco, it is confronted with a serious problem under Section 16(b) of the '34 Act. Briefly, these problems involve the following considerations:

1. The consummation of the reorganization between Tenneco and Kern and the exchange by shareholders of Kern, including Occidental, of their shares of Kern capital stock for new Tenneco Preferred Stock within a period of less than six months of the purchase by Occidental of the Kern shares might well bring this combination of transactions within Section 16(b) and, accordingly, might well oblige Occidental to pay over any and all profits deemed to have arisen from these transactions to Kern or its cor-

---

[1] The transactions referred to herein and the possible liability under Section 16(b) were disclosed in Occidental's Prospectus dated July 19, 1967 with respect to a public offering of $100,000,000 in principal amount of Convertible Subordinated Debentures due July 1, 1992.

porate successor, Tenneco Corporation. While this legal conclusion is subject to considerable doubt, applicable decisions rendered by the Federal courts in this area would indicate that Occidental faces a very serious potential liability under Section 16(b) in this regard.

2. As indicated above, if the new Tenneco Preferred Stock is registered under Section 12(b) of the '34 Act and listed on the New York Stock Exchange prior to the date of exercise of the option by Tenneco or its assignee, the exercise of such option by Tenneco or such assignee would involve a sale by Occidental of the Tenneco Preferred Stock which would be matched with Occidental's prior "purchase" (deemed to have arisen by reason of the issuance of such stock pursuant to the Kern-Tenneco reorganization) to oblige Occidental to pay over any profits which may be derived from that combination of transactions to Tenneco.

These conclusions are, as noted above, based upon applicable precedents representing decisions rendered by Federal courts dealing with the application of Section 16(b) to corporate reorganizations analogous to the Kern-Tenneco reorganization referred to herein. The statement of these views should not be construed in any way as acquiescence by Occidental or its counsel in their legal validity or as an express or implied admission by Occidental of liability under Section 16(b). If necessary, Occidental is prepared to contest vigorously the application of Section 16(b) to this set of facts in order to avoid this unjust and harsh result which was never intended when the statute was enacted and which has provoked strong objections from several authorities in this area of securities law. Suffice it to note, however, that the application of this interpretation of Section 16(b) to the Kern-Tenneco-Occidental transactions could cost Occidental (and, therefore, its shareholders) many millions of dollars. Signifi-

cantly, a lawsuit has already been filed against Occidental by a shareholder of Kern in the United States District Court, Southern District of New York, alleging, among other things, a violation of Section 16(b) arising out of the transactions described herein even though they have not been consummated as of this date.

While not dispositive of the first aspect of the problem under Section 16(b) now confronting Occidental, a delay in the registration under Section 12(b) of the '34 Act and the listing of Tenneco Preferred Stock is crucial to preclude Occidental's liability under Section 16(b) with respect to the second aspect of the transactions referred to above. In this connection, it is the opinion of Occidental's counsel that the verbal assurance respecting the registration and listing of the Tenneco Preferred Stock constitutes a contractual obligation on the part of Tenneco, the consideration for which was the dismissal of various actions brought by Occidental against Kern at the time that the agreement between Kern and Tenneco was executed. At the risk of belaboring the point, it should be noted that Occidental has adhered to its obligations under this contractual understanding by dismissing such actions. Unfortunately, Occidental has no assurance that Tenneco intends to respect this understanding in the same manner.

Finally, this is further to advise you that it is our understanding that the consummation of the Kern-Tenneco reorganization may be delayed for a presently indeterminable period by reason of a pending lawsuit instituted by two shareholders of Kern in Texas seeking an injunction against consummation of the reorganization on the ground that the agreement between Kern and Tenneco does not properly reflect the true asset value of Kern and that Kern's shareholders are being prejudiced thereby.

You will readily note the scope of the problem faced by Occidental and its shareholders. Since shares of Occi-

dental are listed on the New York Stock Exchange, we believe it is correct to assume that this is also a matter of considerable concern to the New York Stock Exchange as well. Accordingly, by reason of the considerations set forth in this letter, this is to advise you that if Tenneco attempts to register the new Tenneco Preferred Stock under Section 12 of the '34 Act and/or applies for the listing of such Preferred Stock on the New York Stock Exchange or any other national securities exchange on a date which is inconsistent with the terms of its contractual obligations to Occidental, Occidental intends to take such legal action as may be required to enjoin such registration and/or such listing of such shares until such date as Occidental will be able to avoid its potentially serious problems under Section 16(b) of the '34 Act.

Since very vital interests of Occidental, its shareholders, and the New York Stock Exchange are involved, we believe it incumbent upon us to inform you of these developments and also to advise you of Occidental's position in the matter. In addition, we respectfully request that the Exchange keep us advised of any further developments which come to its attention with respect to this matter.

Thanking you in advance for your courtesy and cooperation.

Very truly yours,

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON

By: Melvin Katz
MELVIN KATZ

MK.hc
Enclosures

Exhibit P, Annexed to Foregoing Affidavit

Law Offices of
MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK
120 Montgomery Street
San Francisco 94104

Telephone
Area Code 415
421-5670
Cable "Mohelo"

August 9, 1967

Dr. Armand Hammer, President
Occidental Petroleum Corporation
10889 Wilshire Boulevard
Los Angeles, Calif. 90024

Re: Kern County Land Co.

Dear Dr. Hammer:

Enclosed herewith is a copy of a letter dated June 16, 1967, from Bruce Mann to me, copies of which went to Daum and to you. I interpret Bruce's frequent references to listing to include registration and because of the fact that this letter went to both you and Daum, and was the basis for our dismissing the lawsuits against Kern, it constitutes a contract.

Sincerely,

Dick
RICHARD J. ARCHER

RJA:LS
Encl.
cc: Richard H. Wolford, Esq.
w/encl.

Exhibit P, Annexed to Foregoing Affidavit

Law Offices of
PILLSBURY, MADISON & SUTRO
Standard Oil Building
225 Bush Street
San Francisco, California 94104

Telephone 421-6133
Area Code 415

June 16, 1967

By Hand

Richard J. Archer, Esq.
Messrs. Morrison, Foerster,
Holloway, Clinton & Clark
120 Montgomery Street
San Francisco, California 94104

Dear Dick:

I have been advised by F. Arnold Daum, Esq., counsel for Tenneco Inc., that the Agreement and Plan of Reorganization between Tenneco and Kern County Land Company provides that Tenneco has until December 31, 1967, to list the Preference shares being delivered to KCL. The agreement further provides that in the event the sale of assets does not occur prior to December 1, 1967, Tenneco has 30 days following the sale of assets to effect the listing.

While the foregoing provision does not obligate Tenneco Inc. to delay listing until the option granted by Occidental Petroleum Corporation his been exercised or expired, Mr. Daum advised me, and indicated that he had assured Al Brown, that the listing would not be effected until after the option is exercised or expires. Mr. Daum also advised me that his client was aware of and had agreed to the assurances given by Mr. Daum.

Exhibit Q, Annexed to Foregoing Affidavit

On the basis of the foregoing, you should take prompt steps to cause the various actions brought by Occidental Petroleum Corporation against Kern County Land Company to be dismissed.

Very truly yours,

Bruce
Bruce Allan Mann

cc: F. Arnold Daum, Esq.
Dr. Armand Hammer

Exhibit Q, Annexed to Foregoing Affidavit

(OCCIDENTAL'S ORIGINAL PROPOSED RULE 16(b)-11)

Draft

Rule 16b-11:

(a) There shall be exempt from the provisions of section 16(b) as not comprehended within the purpose of such subsection the disposition, by a beneficial owner of more than 10 percentum of a class of equity security, of such security, pursuant to a merger or consolidation if such beneficial owner (1) acquired such security within 6 months prior to the merger or consolidation as a result of having made a public invitation for tenders of such security, and (2) such beneficial owner is not an affiliate, as defined in rule 12b-2, of any company which is a party to such merger or consolidation.

(b) A merger within the meaning of this rule shall include the sale or purchase of substantially all the assets of one company by another in exchange for stock which is then distributed to the security holders of the company which sold its assets.

(c) If such beneficial owner shall sell any security acquired by him pursuant to such merger or consolidation within a period of less than 6 months after his purchase of the security disposed of by him in such merger or consolidation then the exemption provided by this rule shall be unavailable to such beneficial owner.

Exhibit R, Annexed to Foregoing Affidavit

(LETTER, DATED AUGUST 11, 1967 WITH LETTER, DATED JUNE 16, 1967, ATTACHED)

GIBSON, DUNN & CRUTCHER
Lawyers
634 South Spring Street
Los Angeles, California 90014

Area Code 213
Telephone 620-9300
Telex: 67-4930
Cable Address: Gibtrask

August 11, 1967

The Honorable Robert H. Volk
Commissioner of Corporations
of the State of California
Los Angeles, California

Re: Application of Tenneco Inc.
No. 65691 SF

Dear Sir:

Earlier this week you invited the attorneys for Tenneco Inc. ("Tenneco" herein) and the attorneys for Occidental

Exhibit R, Annexed to Foregoing Affidavit

Petroleum Corporation ("Occidental" herein) to file memoranda with you by today with respect to the elements of fairness and unfairness of the plan to combine Tenneco with Kern County Land Company ("Kern" herein), and the scheduling and implementing of such plan. Under date of August 8, 1967 we, as counsel for Occidental, filed a written protest with you with respect to the application for permit to implement the plan which was filed with you by Tenneco. This letter is intended as a response to your invitation to file a statement of the position of Occidental with respect to the unfairness of certain elements of the plan as it has now developed and is also intended as a supplement to our written protest dated August 8, 1967.

To begin with, we would like to reiterate that we have not taken a position in opposition to the general substantive elements of the plan with respect to values, such as the terms of the preference stock which Tenneco proposes to issue in consideration for the general business and assets of Kern. However, we cannot stress too strongly the complete unfairness of what we understand to be the proposed method and schedule of Tenneco in implementing that plan. We would like to call attention at the outset that this unfairness is double-barreled:

First: As detailed in this memorandum, Tenneco's presently proposed method and scheduling is completely unfair to Occidental, an owner of approximately 20% of the outstanding stock of Kern, with no substantial countervailing elements of unfairness to other shareholders of either Kern or Tenneco if a different schedule of implementation is adopted which will eliminate such unfairness to Occidental.

Second: The proposed unfair method and scheduling by Tenneco is in direct violation of the understanding between the principal officers and legal

counsel of Tenneco and Occidental, known to and presumably acquiesced in by the principal officers and legal counsel for Kern at the time the plan was being formulated, and reflected in the dates and periods specified in the plan itself. Having received all the benefits of that understanding, Tenneco and Kern apparently intend to disregard the balance of that understanding with respect to the method of scheduling and implementing the plan. This is patently unfair, unjust and inequitable.

So many of the elements of unfairness are related that they can be most clearly pointed out in chronological order:

1. The inception of the entire transaction was a tender offer by Occidental to the shareholders of Kern at a time when Occidental held a negligible number of shares of Kern.

On Monday, May 8, 1967, Occidental made a public tender offer to the shareholders of Kern to purchase up to 500,000 shares of Kern stock at a cash price of $83.50 per share, which price was $20 above the closing market price of Kern stock on the New York Stock Exchange the previous Friday, May 5, 1967. Occidental had no list of the shareholders of Kern, and therefore could not communicate with them individually.

On Wednesday, May 10, 1967, Kern sent a letter to its shareholders wherein the management of Kern stated in part:

"We fully realize how tempting his [Occidental's] offer may seem. Your most obvious reason for refusing to tender your shares, however, is simply the fact that you can do better.

"We have in hand at this time a number of offers from strong and reputable corporations

to discuss merger possibilities . . . and your Board of Directors has been giving full consideration to such opportunities.

"Armand Hammer [Occidental], it must be admitted, has evaluated the Company better than have most outsiders. He fully appreciates the fact that our 1.8 million acres of land are carried on our books at a fraction of their market value and that no discovery value is assigned to the oil reserves underlying our California lands. Obviously he, too, sees the growth ahead that we expect for KCL."

On Thursday, May 11, 1967, Occidental extended its offer to cover an additional 500,000 shares at the $83.50 price.

On Monday, May 15, 1967, Kern sent a letter to its shareholders wherein it stated in part:

"Since we last wrote to you, a number of additional companies have indicated interest in possible merger with our Company.

"Talks are under way with selected companies, but for obvious reasons we cannot at this time reveal the name of any corporation under consideration. . . .

"So we want you to know that we are working toward arrangements that should be far more beneficial to your interests than the Occidental tender offer."

On Friday, May 19, 1967, Kern released for public distribution a statement wherein it stated in part:

"San Francisco, May 19—The Board of Directors of Kern County Land Company voted to-

day to accept an offer of Tenneco Inc., subject to the approval of the share owners of both companies, President Dwight M. Cochran announced. . . ."

From the foregoing it is clear that the Kern management sought to prevent Occidental from acquiring additional stock in Kern and approved a defensive merger agreement with Tenneco within eleven days after the first public tender offer by Occidental which first called to the attention of the Kern shareholders the fact that the price of their shares was grossly out of proportion to their value as known to Kern insiders.

2. Commencing May 22, 1967 Occidental requested the opportunity to inspect and make extracts of the share register, books of account, minutes of proceedings of the shareholders, directors and executive committee of Kern, together with all records, books and documents referred to in said minutes or made a part thereof. Occidental particularly asked to see the minutes of the meeting which had accepted the offer of Tenneco. When told that those minutes had not been prepared, they requested an opportunity to examine the offer and other documents which had been acted upon at the meeting. While Occidental was permitted to see some books and records, it was denied access to the stockholder list and to any of the records of the stockholders, directors or executive committee in May 1967 and any papers with respect to the Tenneco offer or any other offers. On May 25, 1967 Occidental filed a civil action in the Superior Court of California for the City and County of San Francisco, Number 579283, seeking access to the records which had been denied to it. This was dismissed in mid-June, as hereinafter described.

Exhibit R, Annexed to Foregoing Affidavit

3. Occidental, now an owner of approximately 20% of the stock of Kern, had to decide on whether to oppose the Kern-Tenneco combination. Among other things there would be a question whether under Section 16(b) of the Securities Exchange Act of 1934 (the "Act") the consummation of a combination between Kern and Tenneco within six months of the Time Occidental acquired its holdings in Kern might not entitle Kern to recover from Occidental the paper profit, if any, of the difference between the cash price paid by Occidental for the Kern shares and the value of the securities it would receive on consummation of the combination. There were a number of ways in which this question could be prevented from ever arising:

(a) Section 16(b) would not apply at all to the holders of stock in the surviving corporation of a merger transaction. Thus if A purchased shares in Corporation X shortly before a merger between Corporation X and Corporation Y, there is no 16(b) problem if Y merges into X, but one does arise if X merges into Y. In many instances the larger corporation merges into a smaller corporation for various tax and other reasons, as in the case of the recent merger of Douglas Aircraft Company into McDonnell Company. In the present situation, however, it was understood that the plan was that Tenneco be the surviving corporation of the plan.

(b) With the various steps needed to consummate the proposed Kern-Tenneco combination, including Internal Revenue Department rulings and stockholder approval, it might well be that the plan would not be consummated short of the six months period. This might well be the result if Occidental opposed the plan strenuously from the start and solicited the proxies of others.

(c) The Securities and Exchange Commission had long been studying an exemption from 16(b) for

transactions like the Kern-Tenneco plan. Legal counsel for Occidental, after consultation with the Chairman and General Counsel of the Securities and Exchange Commission, assured Occidental that a rule establishing such exemption, at least for those who became substantial owners of stock in a corporation by reason of a tender offer which was followed by a merger or similar transaction with another party, would be promptly adopted.

4. Tenneco and Kern were desirous of avoiding the opposition of, and a possible proxy fight with, Occidental in connection with the Kern stockholders meeting which would be required for approval of the Kern-Tenneco plan. They also were desirous of having the power to eliminate Occidental from the combined company when, as and if the plan was consummated. Occidental on its part has many other interests, would not be insistent on remaining a substantial stockholder in Tenneco after the plan had been consummated, and, under the circumstances so far as it knew them at that time, did not choose to oppose the plan unless that was necessary to prevent Tenneco, by its own action, imposing a possible 16(b) liability on Occidental by consummating the plan prior to December 9, 1967. Of course, this latter possibility would be eliminated if the SEC adopted the proposed rule meantime.

5. During the latter part of May and the first days of June, 1967, a member of the top management of Occidental and of the top management of Tenneco, together with their legal counsel, conferred on how to implement the respective objectives of the two companies in carrying out the transaction with Kern. Many methods and procedures were discussed, the final results of which were as follows:

(a) Under date of June 2, 1967 an option agreement was entered into between Occidental and a

wholly-owned subsidiary of Tenneco by the name of Tenneco Corporation, a Delaware corporation **("Tenneco's Subsidiary" hereinafter), whereby Tenneco's** Subsidiary was given the option to purchase 886,623 shares of preference stock in Tenneco, which Occidental would receive when, as and if the Kern-Tenneco plan was closed, for a total price of $93,095,415. That was 5% over the market price of the corresponding Kern shares at that time.

Occidental was not willing to sell its Kern shares outright and involve itself in a short-term capital gain tax. It was, however, willing to grant an option on the Tenneco shares it would receive. The option provided that Tenneco's Subsidiary could not in any event exercise the option prior to December 10, 1967. If the Tenneco-Kern plan was closed prior to December 10, 1967 the option expired on December 31, 1967; but if the plan was closed on or after December 10, 1967 then the option expired on the 30th day after the closing. If the closing was not completed prior to July 31, 1968, the option terminated and the option agreement required that Occidental return to Tenneco's Subsidiary the amount paid for the option.

Such amount paid for the option was approximately 9½% of the purchase price and was to be applied in reduction of the purchase price if the option was exercised.

(b) The dates and periods in the Kern-Tenneco plan were fixed by the parties to be consistent with, and permit the carrying out of, the agreement reached at the same time between Tenneco and Occidental and acquiesced in by Kern.

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(i) Whether or not the anticipated rule was adopted by the Securities and Exchange Commission, a new 16(b) problem might arise with respect to the Tenneco preference stock which Occidental would receive on the closing of the plan if the option were exercised within the periods provided for exercise in the option agreement with Tenneco's Subsidiary. However, Section 16(b) of the Act expressly does not apply to securities not registered under Section 12 of the Act (sometimes referred to as unlisted securities because such registration is necessary in connection with listing). One of the above mentioned agreements was that the Tenneco preference stock would not be registered under the Act until the option was either exercised or expired. Under the terms of the option one or the other of these events would occur within thirty days after the closing unless the closing was prior to December 1, 1967, in which latter event the option would expire December 31, 1967. In recognition of this agreement, the plan itself provides in Section 6.3 on page 14 thereof that Tenneco covenants to list the preference stock on the New York and Pacific Coast Stock Exchanges "no later than December 31, 1967 if the closing date shall occur on or before December 1, 1967, and no later than thirty days after the closing date if that date shall occur after December 1, 1967".

The agreement is further confirmed by a letter of June 16, 1967 from Pillsbury, Madison & Sutro (who negotiated the agreement on behalf of Occidental with counsel for Tenneco) to Morrison, Foerster, Holloway, Clinton & Clark, who were handling the suit on behalf of Occidental to obtain certain records and stockholders lists from Kern,

advising the addressee that, on the basis of the agreement, they should take steps to dismiss the actions. Carbon copies of this letter were sent to counsel for Tenneco and to the president of Occidental. A copy of this letter is attached hereto.

(ii) Ample time would be allowed to obtain a Securities and Exchange Commission ruling and, if the expected rule exempting the closing transaction as a "sale" under Section 16(b) were not adopted, the agreement between Tenneco and Occidental was that the parties would cooperate to obviate the 16(b) problem ever arising. In recognition of this, the plan provides in Section 7.9 on page 16 thereof that the closing shall take place in San Francisco "on such date not earlier than September 30, 1967 and not later than December 31, 1967 as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon." Undoubtedly the "other time" provision was appropriate in view of the fact that unforeseen circumstances may delay closing of the plan beyond the expectation of the parties at the time. It was not the intention of the parties to close prior to September 30, 1967, and the Proxy Statement expressly states the intention of the parties to close between that date and December 31, 1967. The key date, if the ruling from the Securities and Exchange Commission was not obtained earlier, would be December 9, 1967, as that was six months after the latest date on which Occidental obtained any Kern shares.

6. The proposed Securities and Exchange Commission rule holding that the closing of a transaction such as this

would not constitute a "sale" of the Kern stock held by Occidental has not yet been adopted, although it was confidently expected much earlier. The proposed rule was not a special one for this case, but one which would be of general application including this case. The SEC has long had such a rule under consideration but is anxious not to word it in such a way as might provide loopholes for the unscrupulous.

On July 12, 1967, the secretary of the SEC wrote to Washington counsel of Occidental advising him that "the Commission considers it undesirable to publish for comment any proposed rule in this area at the present time." We are hopeful of changing this attitude and expected that we would have an opportunity to do so before the closing. When and if such a rule is obtained it will be of enormous benefit in many transactions and not just in the present one.

7. In the conference call between the Commissioner, counsel for Tenneco and counsel for Occidental on August 8, 1967, counsel for Tenneco stressed the argument that Tenneco and Kern wished to accelerate the closing of the Plan in order that the Kern shareholders might obtain at an early date the higher dividend rate on the Tenneco preference stock as compared to the dividend rate on the Kern stock. This argument, to say the least, was not a frank disclosure to the Commissioner of the fact that whether the plan is closed now or on September 30, 1967 or on December 9, 1967 the dividends to the Kern shareholders will be identically the same.

At the very first meeting between a principal officer of Occidental, a principal officer of Tenneco and counsel for each company, during which the option to a Tenneco subsidiary was negotiated, counsel for Tenneco stated that they wanted the first dividend on the Tenneco preference stock to be that of January 1, 1968 (for the quarter October 1, 1967 through December 31, 1967) and that this would

occur if the closing came about at any time during the period September 30, 1967 to December 31, 1967.

On August 10, 1967, Tenneco filed with the Commissioner of Corporations, in connection with its pending application, Tenneco's certificate of designation, preference and rights with respect to the preference stock which is the preference stock which is the subject of the application stating that this form was approved by the board of directors of Tenneco at their meeting on Monday afternoon, *August 7, 1967.* That certificate states the dividend provisions on the preference stock to be received by the Kern shareholders (4,332,093 shares) as follows:

> "The dividend rate on the Cumulative Convertible Preference Stock shall be $5.50 per annum. As to the first 4,332,093 shares of Cumulative Convertible Preference Stock which are issued, dividends thereon shall accrue from September 30, 1967; and as to all other shares of Cumulative Convertible Preference Stock, dividends shall accrue from the date of issuance thereof or September 30, 1967, whichever is the later date."

We point out that this was a change from the certificate accompanying the proxy statement to the Kern shareholders as Exhibit D and the description of the preference stock which is Exhibit B. In each place, they pointed out to the shareholders that dividends on the preference stock would accrue from date of issuance. Now the dividend will accrue from October 1, 1967 even if the closing is after September 30, 1967. Consequently, the Kern shareholders are assured of receiving their Kern common dividend for the fiscal quarter ending September 30, 1967 and their Tenneco preferred dividends for the fiscal quarter ending December 31, 1967 regardless of the closing date.

Exhibit R, Annexed to Foregoing Affidavit

8. A few minutes ago, we received a copy of a memorandum to the Commissioner from Tenneco directed to the question as to whether it is fair to the shareholders of Kern to close the Kern-Tenneco transaction at this time. We will desire to answer that memorandum more fully in a separate memorandum. Meanwhile, we would like to call your attention to the following:

(a) Tenneco now admits that the dividends to be received by the Kern shareholders will be the same whether the closing takes place at this time or on September 30 or on December 9 or on December 31, 1967 (their points 2 and 3). Consequently, on this score there would be no unfairness in delaying the issuance of the permit.

(b) As to the interest of the shareholders as to when they will receive their shares, they were told in the proxy statement that the closing would be in the period of September 30 and December 31, 1967 and it is only Tenneco and Kern who are creating any confusion by indicating there might be an earlier date.

(c) If an increased value of shares is sure to result upon a closing as Tenneco assumes, the experience of the market place is that this is always substantially reflected in the present price of the stock to be surrendered. Any rumors about delay, if they exist, are undoubtedly the result of Tenneco's precipitous desire suddenly to change the closing date from the period stated in the Proxy Statement.

(d) Tenneco and Kern argue that a "delay" in the closing date to the time specified in the plan and in the Proxy Statement will disadvantage their executive management and administrative personnel who are now ready to close the transaction. We do

not think that the Kern personnel will sit around doing nothing until the closing. Both companies are permitted to conduct their business in its regular course and the plan contemplates that the closing may not only take place on December 31, 1967 or even later. Obviously, the management of each company retained sufficient flexibility to operate its business until the closing that would be held in December 1967 or thereafter.

(e) Tenneco and Kern argue that a delay in closing will hamper their efforts to meld their two organizations. In the Proxy Statement of Kern, it is stated that the business of Kern will continue as a separate unit under the Kern name and management and with its present employees. It is further stated on page 3 of the Kern Proxy Statement (wherein KCL refers to the Tenneco Subsidiary which will eventually receive substantially all of Kern's business and assets):

> "It is the intention of Tenneco that the operation of KCL continue in substantially the same manner in which the business of KCL is presently being conducted. Tenneco also intends to retain KCL's present management and personnel."

(f) We are astounded that Tenneco and Kern state as a reason for closing promptly the possibility that their act might compel Occidental to pay to Kern the "paper profit" which Occidental might be held to have realized under the provisions of 16(b). Any claim for such liability arises only from the combination of a purchase and a sale in a period of less than six months. It does not arise unless Tenneco closes the transaction prior to December 9, 1967 or the earlier date a rule is obtained from the SEC. It

would be Tenneco's act of closing which, for the first time, would create a possible claim under 16(b). This is in no way related to the option and the situation would be the same whether or not Occidental had ever granted an option to Tenneco's Subsidiary. It should be pointed out that the option is beneficial only to Tenneco's Subsidiary. It has the effect of placing a limit on the price, on the upside, that Occidental might receive for the shares with no assurance that the option will ever be exercised. It was given to cooperate with Tenneco and Kern in their desire to have the power to remove Occidental as a substantial shareholder.

We do not ask that Tenneco or Kern do anything "to let Occidental off the hook", as they put it. We merely ask that they not fire a harpoon into Occidental contrary to what was contemplated in the plan and contrary to the agreements above outlined. The Commissioner will be interested that, while much is said about the possible 16(b) claim of Kern and the benefit to Kern shareholders, it appears that Tenneco would probably be the beneficiary of any such claim rather than Kern. Pursuant to Sections 7.1 and 7.3, Kern is obligated to transfer to Tenneco all claims, choses in action, rights and other assets which Kern may acquire or to which it might become entitled whether before, on or after the closing date, other than the shares of preference stock delivered to Kern under the plan. The Kern shareholders will be a tiny minority of the shareholders of the combined company after the closing.

9. Tenneco, Kern and Occidental are the corporations involved. Much is said about the Kern shareholders other than Occidental. A little is said about the shareholders of Tenneco. Nothing is said about the thousands of share-

holders of Occidental, a California corporation a large proportion of whose shareholders are in this state and whose shares are also listed on the New York Stock Exchange. If Tenneco creates a 16(b) claim against Occidental, the disruption of the company and the effect on the market price of its shares will be monumental in comparison with the minimal effect of delaying the closing of the plan until the latter part of the period (September 30 to December 31) specified in the plan as the time it was expected to be closed.

10. One of the conditions to the closing of the plan is the obtaining of a ruling from Internal Revenue on the tax-free aspects of the plan so far as the shareholders of Kern are concerned. We understand that Tenneco obtained a ruling from Internal Revenue which, however, was conditional. Tenneco's counsel says that the conditions have been or will be fulfilled. In a telephone conference between the Commissioner, counsel for Tenneco and counsel for Occidental, Tenneco refused to let Occidental or its counsel have a copy of the ruling and information as to what the conditions were or how they were fulfilled. His stated reason was "It's none of the Kern stockholders' business!" This is quite an amazing statement in view of the fact that the tax-free nature of the reorganization and the status of the preference stock under Section 306 of the Internal Revenue Code of 1954, as well as the other matters on which it was represented that a tax ruling was to be obtained, are of vital importance to all Kern stockholders. Under prodding by counsel for Occidental, counsel for Tenneco did say that he would give a copy of the ruling to the Commissioner, and it should surely be examined by the Commissioner and information obtained as to whether and how the conditions were fulfilled before any permit is issued. It goes to the very essence of the plan so far as the Kern shareholders are concerned.

Exhibit R, Annexed to Foregoing Affidavit

11. The Commissioner clearly has authority to refuse to issue a permit to Tenneco at a time when a great unfairness, injustice and inequity would occur to, and a fraud be worked upon, Occidental and its thousands of stockholders by reason of the methods Tenneco proposes to use in issuing and disposing of its securities. (See Section 25507 Corporations Code.)

We have tried not to reiterate matters which were included in our protest dated August 8, 1967 to which this is a supplement. However, all of the matters therein stated are intended to be incorporated in this memorandum. It is submitted that the requested permit should not be issued at this time in view of the stated intention of Tenneco to use methods and scheduling to carry out the plan thereunder which would be (i) unfair, unjust, inequitable and work a fraud on Occidental and its thousands of shareholders, (ii) unfair, unjust and inequitable because contrary to the representations in the proxy statements of Kern, and (iii) unfair, unjust and inequitable and work a fraud on Occidental and its shareholders because in violation of the agreements between Tenneco and Occidental which Occidental has performed in full.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
By Herbert F. Sturdy
HERBERT F. STURDY
Attorneys for Occidental
Petroleum Corporation

HFS.mhf
Enc.

cc: √Tenneco Inc.
McCutchen, Doyle, Brown & Enersen

Exhibit R, Annexed to Foregoing Affidavit

Law Offices of
PILLSBURY, MADISON & SUTRO
Standard Oil Building
225 Bush Street
San Francisco, California 94104
Telephone 421-6133
Area Code 415

June 16, 1967

By Hand

Richard J. Archer, Esq.
Messrs. Morrison, Foerster,
Holloway, Clinton & Clark
120 Montgomery Street
San Francisco, California 94104

Dear Dick:

I have been advised by F. Arnold Daum, Esq., counsel for Tenneco Inc., that the Agreement and Plan of Reorganization between Tenneco and Kern County Land Company provides that Tenneco has until December 31, 1967, to list the Preference shares being delivered to KCL. The agreement further provides that in the event the sale of assets does not occur prior to December 1, 1967, Tenneco has 30 days following the sale of assets to effect the listing.

While the foregoing provision does not obligate Tenneco Inc. to delay listing until the option granted by Occidental Petroleum Corporation has been exercised or expired, Mr. Daum advised me, and indicated that he had assured Al Brown, that the listing would not be effected until after the option is exercised or expires. Mr. Daum also advised me that his client was aware of and had agreed to the assurances given by Mr. Daum.

Exhibit S, Annexed to Foregoing Affidavit

On the basis of the foregoing, you should take prompt steps to cause the various actions brought by Occidental Petroleum Corporation against Kern County Land Company to be dismissed.

Very truly yours,

Bruce
BRUCE ALAN MANN

cc: F. Arnold Daum, Esq.
Dr. Armand Hammer

Exhibit S, Annexed to Foregoing Affidavit

(OCCIDENTAL'S PROPOSED REVISED RULE 16(b)-11)

(a) There shall be exempt from the provisions of Section 16(b) as not comprehended within the purpose of such Section the disposition of an equity security of an issuer, by a beneficial owner of more than 10% of the class of security of which such equity security is a part, pursuant to a merger or consolidation to which such issuer is a party, if all of the following circumstances and conditions are fulfilled:

(1) Such disposition is in exchange for stock issued by a party to such merger or consolidation;

(2) Such equity security so disposed of by such beneficial owner is registered under Section 12 of the Act and listed for trading on a national securities exchange registered under Section 6 of the Act;

Exhibit S, Annexed to Foregoing Affidavit

(3) The acquisition by such beneficial owner of substantially all of such portion of such equity security as was acquired within six months prior to the merger or consolidation resulted from such beneficial owner having made a public invitation for tenders of such security, including successive extensions or enlargements of such invitation for tender, and if such invitation for tenders is made by or in the name of an agent, nominee or attorney for, or otherwise on behalf of, another person, the public invitation for tenders shall disclose the name of such other person and its relationship to the person so making such public invitation for tenders;

(4) Such public invitation for tenders was at a price not less than 25% above the last sales price of such securities on a registered national securities exchange on the last day on which such security was traded on such exchange preceding the day upon which the initial invitation for tenders was made to the public by such beneficial owner;

(5) Such merger or consolidation is approved by the vote or written consent of the holders of at least a majority of all securities of such issuer entitled to vote on or consent to such transaction without counting in such majority any vote or consent of such beneficial owner;

(6) Such vote or written consent of the holders of securities of such issuer was solicited substantially in accordance with the rules and regulations in effect under Section 14(a) of the Act at the time such vote for written consent was solicited, but no failure to comply with such rules and regulations which does not invalidate the approval of the owners of the securities voting or consenting and nullify the merger or consolidation shall impair the effect of the exemption under this Rule;

Exhibit S, Annexed to Foregoing Affidavit

(7) At no time within the period commencing six months before the first publication of such public invitation for tenders and ending with such disposition by said beneficial owner of such equity securities pursuant to such merger or consolidation (i) was such beneficial owner an officer, director or, directly or indirectly, a beneficial owner of more than 10% of any class of equity security of such issuer, except as a result of such public invitation for tenders, or of any other party to such merger or consolidation, (ii) was any partner, officer or director of such beneficial owner an officer or director, or directly or indirectly, a beneficial owner of more than 10% of any class of equity security of any corporation which is a party to such merger or consolidation, (iii) was such beneficial owner an affiliate as defined in Rule 12b-2 of any corporation which is a party to such merger or consolidation;

(8) At all times during the period defined in clause (6) above, at least one class of security issued by such beneficial owner was registered under Section 12 of the Act.

(b) A merger within the meaning of this Rule shall include the sale of substantially all of the assets of one corporation to another corporation in exchange for stock of the latter or an affiliate of the latter, which stock is then distributed to the security holders of the corporation which sold its assets, whether such assets are transferred to such purchasing corporation or to an affiliate of the latter.

(c) If such beneficial owner shall sell any securities acquired by him pursuant to such merger or consolidation, other than fractional shares, within a period of less than six months after the purchase by the beneficial owner of the equity security so disposed of pursuant to such merger or consolidation then the exemption provided by this Rule shall be unavailable to such beneficial owner.

Exhibit T, Annexed to Foregoing Affidavit

(Letter, Dated September 5, 1967)

Gibson, Dunn & Crutcher
Lawyers
634 South Spring Street
Los Angeles, California 90014

Area Code 213
Telephone 620-9300
Telex: 67-4930

September 5, 1967

Securities and Exchange Commission
500 North Capitol Street
Washington, D. C.

Re: Suggested Rule 16b-11

Gentlemen:

We sincerely appreciate the opportunity given to us, as counsel of Occidental Petroleum Corporation ("Occidental"), to present to the Commission, at the hearing Tuesday morning, August 29, 1967 and by this statement which your permitted us to file, those pertinent matters bearing on the suggested new Rule 16b-11 which we have heretofore submitted to the Commission for its consideration. The suggested new rule would, under strictly limited circumstances exempt from Section 16(b) of the 1934 Act the surrender of equity securities for stock pursuant to a merger, consdidation, or sale of assets for stock followed by a dissolution of the seller and the distribution of the buyer's securities to the stockholders of the seller (all of which transactions are hereinafter for convenience referred to as "merger").

Exhibit T, Annexed to Foregoing Affidavit

In summary, that rule would exempt from Section 16(b) the surrender of one stock for another stock pursuant to a merger if the beneficial owner of the surrendered stock became such by reason of a public tender offer under prescribed conditions which would eliminate, for all practical purposes, the possibility of the beneficial owner's having profited from inside information gained as a result of his stock ownership. The rule as presented would *not* exempt the acquisition of the new stock by reason of the merger. Also the rule would *not* attempt to pass upon the legal effects of, or the liability of the beneficial owner arising from, any other transactions than the acquisition of shares by reason of the public tender offer and the surrender of such shares in a merger which is involuntary so far as such beneficial owner is concerned, at least to the extent that it must have been approved by the necessary majority of shareholders *exclusive of the beneficial owner*. Consequently any other legal questions which might in any particular circumstances arise out of other agreements made or acts performed by the beneficial owner vis-a-vis the other parties to the merger or their stockholders would remain open to be disposed of in due course by the courts. While this was the intent of the rule as suggested, we are including herein proposed additional language which will make this result crystal-clear.

We realize that there may well be a reluctance to pass a rule while there is a particular situation pending. But in all probability there will always be some one or more particular situations pending. Furthermore, our experience has been that most legislation and most administrative rules and regulations are adopted because some particular situation is called to attention which illustrates the need for some change in the existing law or the existing rules or regulations. Under such circumstances, it has been our experience that the best results are obtained in the long run by adopting laws and rules which meet the problem of

particular circumstances as they arise and progressively amending and expanding such laws and rules as later experience demonstrates this to be desirable.

The Rationale for the Exemption from 16b of all Exchanges of Equity Securities in a Merger

We are fully aware that there has long been responsible advocacy, such as by the Securities Committee of the Bar of the City of New York of which Mr. Daum, counsel for Tenneco Inc., is a member, for the exemption from 16b of all exchanges of equity securities in a merger, comparable to the present exemption by Rule 16b-9 of all exchanges of equity securities as a result of conversions. We are also aware that the Commission is not prepared at this time to grant such an over-all exemption because of an uneasiness over whether it might not be abused. Nevertheless, we should have in mind the rationale for a general exemption of mergers when we are considering a limited exemption so drawn as to eliminate any real opportunity for abuse.

In analogizing mergers and conversions we of course do not argue that there are no distinctions between the two transactions. However, for the purpose of the application of or exemption from Section 16(b) there are many basic similarities. In either case there is an exchange of one equity security for another, the investment remains, and any "profit" is just on paper. There is no realized short-swing profit unless the securities acquired as a result of the merger or conversion are sold within six months after the acquisition of the securities surrendered in the merger or conversion. On the other hand, there are opportunities for insiders to take advantage of information concerning a pending merger, just as they can take advantage of advance inside information about many other favorable and unfavorable facts and events affecting the market price of the securities of their corporation. When proven, there

are many remedies for all such breaches of fiduciary duty, both at common law and under other sections of the 1933 Act and of the 1934 Act. Proof of use of inside information is dispensed with only if the gain to the insider arises from a purchase and sale, or sale and purchase, of securities of the corporation within a period of less than six months. Events which occur within the six months period and which cause the securities of the corporation to rise in value and market price do not bring about a liability under Section 16(b) unless there are a purchase and sale within the prescribed six months period. By reason of Rule 16b-9, an insider may purchase a convertible security based on important inside information, convert it within less than six months after his purchase, and then sell the resulting security without any liability under Section 16(b) unless the latter sale occurs within less than six months of the purchase of the convertible security. The logic of this rule seems equally applicable to a merger situation where equity securities are exchanged and any profit is realized only when the security obtained in the exchange is eventally sold. At the time of the closing of the merger, the two equity securities are economic equivalents. As a matter of fact, for some time after the merger the certificate issued by the merged company will pass for all practical purposes as a certificate evidencing the security of the surviving corporation.

Another illogical result of holding a merger itself to be a disposition and acquisition is illustrated by the fact that liability under Section 16(b) applies to the officers, directors and beneficial owners of one party to the merger but not to the officers, directors and beneficial owners of the other party to the merger, and yet each of them winds up in the same corporation with an expanded business over that which either corporation had before the merger, and frequently with exactly the same class of securities. If X buys more than 10% of a class of equity securities of Corpora-

tion A, and Corporation A shortly thereafter merges with Corporation B, X has no liability under Section 16(b) if Corporation B is merged into Corporation A but he may be liable under Section 16(b) if Corporation A is merged into Corporation B. The direction of a merger is frequently quite fortuitous as, for example, to preserve a loss carry forward. There does not seem to be much logic in holding persons liable under Section 16(b) according to the direction in which the merger takes place. Apparently the merger is not the realizing event, but only the direction in which it takes place. For example, in the case of the Kern-Tenneco merger which has been discussed at some length, it would seem that Tenneco would have no liability under 16(b) for its acquisitions of stock shortly before the merger but will claim to be the beneficiary of an alleged 16(b) liability against Occidental. On page 4 of the proxy statement of Tenneco dated June 16, 1967 Tenneco acknowledged that it had acquired and might continue to acquire, anonymously, Kern County Land Company ("Kern") capital stock. It is there stated:

> "As of June 1, 1967, Tenneco had acquired indirectly through open market purchases approximately 50,700 shares, amounting to approximately 1%, of the capital stock of KCL, and may continue to acquire additional shares of KCL stock from time to time by purchase on the New York Stock Exchange, or otherwise at prevaling market prices."

It is at this same point in the proxy statement that Tenneco recites the fact that its wholly owned subsidiary, Tenneco Corporation, had purchased an option from Occidental on approximately 20% of the Tenneco preference stock to be issued in the merger. Certainly Tenneco had all available inside information about Kern, as illustrated by the recitation of information given to Tenneco by Kern on pages A-3 through A-7 of the Agreement and Plan of Reorganiza-

tion dated as of June 1, 1967 between Tenneco and Kern (the "Plan") which is Exhibit A to Kern's proxy statement dated June 16, 1967, and of the agreement on page A-12 of the Plan that Kern will give Tenneco, its representatives and counsel, full access to all information about Kern and its affiliated companies. (The disposition made by Tenneco and Tenneco Corporation of the Kern stock and Occidental Option on Tenneco preference stock is described later in this statement.)

While there is much to be said for exempting all parties to a merger from 16b liability by reason of an exchange of equity securities, leaving the remedies for improper use of inside information to the common law and other sections of the 1933 and 1934 Acts, the suggested rule is limited to specific circumstances which, it is submitted, obviate the possibility of improper use of inside information.

The Rationale of Limiting the Proposed Exemption to Those who Become beneficial owners of more than 10% of a Class of Registered Equity Securities

The language of Section 16b of the 1934 Act is the best place to start. The section expressly states that it is "for the purpose of preventing the unfair use *of information* which *may* have been *obtained* by such beneficial owner (of more than 10% of a registered equity security), director, or officer *by reason of his relationship to the issuer. . . .*" (Emphasis added.) If the circumstances are such that the person *could not* have obtained information *by reason of his relationship* to the issuer, then the transaction is clearly not within the purpose of the Act of preventing the unfair use of information which may have been so obtained. In the case of a director or officer, there is always the chance that he may have obtained information by reason of his office. However, in the case of a beneficial owner of more than 10% of an equity security, this is not true in all cir-

cumstances. Under the circumstances by which Occidental, or others similarly situated in other corporations, become such beneficial owner, as a practical matter they could not possibly have received any information by reason of being such beneficial owner.

The section itself expressly recognizes a fundamental difference between officers and directors on the one hand and beneficial owners on the other. In the last sentence of Section 16b it is stated:

> "This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, * * *."

Under this clause, if a person was a 9% owner of an equity security at the time he acquired that security but the company later redeemed part of the issue so that he became an 11% owner of the security, nevertheless he would have no 16(b) liability even if he sells the security at a profit within six months of the time he acquired such security. There would be the presumption that he might have had information as an 11% security holder before he sold, but that does not involve him in a liability under 16(b). On the other hand, an officer or director has a 16(b) liability if he were in office either at the time of the purchase or the sale, the presumption being that he may have had and used inside information obtained by reason of his office in whichever end of the transaction took place while he was in office. The suggested new rule limits the exemption to those circumstances where the beneficial owner could not, as a practical matter at the time he acquired the securities, have had any information about the issuer by reason of his being a beneficial owner and the further circumstance that within six months after his acquisition the securities he obtained are exchanged for stock of another corporation pursuant to a

merger approved by the requisite percentage of shareholders without counting his own votes. Under such circumstances he would have had no information by reason of his relationship at the time he acquired the securities and it is submitted that he could not use any information to the detriment of the other shareholders in a merger so approved by the other shareholders.

The Rationale of Limiting the Proposed Exemption to those Beneficial Owners Who Become such by Reason of a Public Tender Offer Complying with Certain Restrictions to Protect the Sellers

At the hearing the question was asked as to why the exemption should have a limitation as to how the beneficial ownership was obtained, or who the beneficial owner was.

Let us first consider the point which was raised that the Commission exempts only transactions and does not base exemptions on how ownership was obtained or other similar circumstances. It is of course true that the authority granted to the Commission is to exempt transactions. But in at least two rules the Commission has exempted merger transactions on the basis of how the securities were acquired and other similar circumstances.

1. Rule 16b-6(c) exempts the transaction of disposing of equity securities pursuant to a merger in the case of those who acquired their equity securities pursuant to an exercise of an option granted more than six months before its exercise or pursuant to the terms of an employment contract entered into more than six months before such acquisition. The rule expressly limits the exemption in the case of a merger to those persons who acquired their securities within six months of the merger in the manner specified.

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2. In Rule 16b-7(a) not only the 85% owner but the owners of the other 15% of the stock of a company entering into a merger are exempted by reason of the circumstances of such 85% ownership. This applies to officers, directors and beneficial owners alike. The disposition or acquisition on the merger is exempted as a transaction because of the 85% or more ownership by one person of the equity securities of one of the companies involved.

3. In a somewhat analogous situation, Rule 12h-3 exempts the transaction of acquisition or disposition of an equity security by a director or officer of the issuer if the timing was such that the transaction was within the period of six months prior to the first effective registration of a class of such equity security of such issuer pursuant to Section 12(g) of the 1934 Act. The exemption was made retroactive as well as prospective. It will not apply to any officer or director of an issuer who first files a registration statement pursuant to Section 12(g) after October 31, 1967.

While all of the rules do not start with the use of the word "transaction", the Commission might prefer to restate the beginning of the suggested Rule 16b-11 to read somewhat as follows:

"(a) The following transactions shall be exempt from the provisions of Section 16(b) as not comprehended within the purpose of said subsection, to wit: The disposition of an equity security of an issuer, by a beneficial owner of more than 10% of the class of security of which such equity security is a part, pursuant to a merger or consolidation to which such issuer is a party, if all of the following circumstances and conditions are fulfilled: * * *."

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We also note that Rule 16b-6(c) limits the mergers to those which are binding on all stockholders except for dissenters' rights of appraisal. The Commission may desire to add this latter qualification to proposed Rule 16b-11. This could be easily accomplished by adding to condition 5 of subsection (a) of the proposed rule the following language:

> ", and the terms of such plan or agreement of merger are binding upon all stockholders of the issuer except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings; * * *."

Turning now to why the suggested rule is limited to securities acquired pursuant to a public tender offer instead of to any form of acquisition, the answer is simply for the purpose of giving better protection to the public.

We realize that there may be a negative attitude toward "tender offers" as a hold-over from the days when tender offers were not regarded as respectable and were usually considered to be a forerunner to the liquidation of a company. However, we do not believe such an attitude is now warranted by the experience of the last several years during which tender offers have been used increasingly by major companies seeking expansion and diversification. It is about the only practical way an inefficient and antagonistic management can be changed for the benefit of all shareholders. It involves heavy investment and many risks. Certainly a potential 16b liability should not be added to these. (See Article by Professors Samuel L. Hayes, III and Russell A. Taussig, Harvard Business Review issue of March-April 1967, particularly pages 138 to 141.)

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A reading of the transcript of the hearings before the Senate Subcommittee on Securities on Senate Bill S510 held last March and April calls attention to certain regulations which appear to be desirable for the protection of the public. We understand that this Bill passed the Senate on September 1, 1967, although we do not have a copy of the Bill as so adopted. It is highly improbable that past tender offers have complied to the letter with every restriction in the proposed new legislation. These have been changed many times and may be changed again before the law is finally adopted. When finally adopted, all tender offers will conform thereto. Meanwhile it would seem that tender offers which have generally conformed to the purposes of this new legislation have better protected and will better protect the public than an anonymous acquisition of shares by a beneficial owner in the market place.

Suggested Rule 16b-11 contains most of the protections specified in Senate Bill 501 (which just passed the Senate) as needed for the public and we are hereby suggesting some additional conditions. In each case, these protections would not be afforded by an acquisition in any other form than a public tender offer.

(a) By a public invitation for tenders both the management and the owners of securities are apprised of the plan to buy such securities. They know, instead of having to guess, what is causing a change in the market price. The plan is publicly announced and everyone has the opportunity to have this knowledge at the same time. This is something which they should know and which they never do know, except by rumor or "leaks" to some but not to all, in the case the plan of purchasing is carried out in the market place.

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(b) The public tender offer must disclose the true name of the buyer under condition 3 of the proposed rule. An accumulation through the market place is usually in the name of nominees, as Tenneco states in its proxy statement was the case in the acquisition by it of 50,700 shares of Kern. The public should know who the buyer is, as it may make a difference to them in deciding whether to sell or to remain in the corporation.

(c) All of the members of the public should receive the same price under the plan of acquisition. This was the case in the invitation for tenders published by Occidental. It is practically never the case when there is an accumulation through the market. We would suggest the addition of a clause to condition 4 of the proposed rule reading as follows: ", and all of those whose tenders are accepted pursuant to the initial invitation for tenders and pursuant to all extensions or enlargements thereof shall have received the same price for their securities".

(d) Senate Bill 501 has provisions to protect the public against having their shares tied up for a lengthy period before they know that their tender will be accepted. There was no such waiting period in the Occidental public invitation for tenders. It was in the form of an offer and every share tendered was automatically purchased by Occidental. There was not even a minimum number of shares which would have to be tendered in order to make the purchase effective. As to a seven-day withdrawal period which I understand the Chairman of the Securities and Exchange Commission recommended to the Senate committee, under the circumstances in the Occi-

dental tender this would have served no purpose. On the 7th day of the public invitation for tenders, 89,456 shares were tendered and there were no indications that anyone was interested in withdrawing. It was not until the 12th day after the public invitation, at which time Kern publicly announced the acceptance by its Board of Directors of the merger agreement with Tenneco, that the volume of tenders became small. If any restriction were to be inserted in the new rule about withdrawal, it certainly should be limited to withdrawal prior to the obligation to purchase becoming firm. That would be the case if there were an accumulation in the market. No one after having sold in the market could get his shares back merely by changing his mind.

(e) Senate Bill 501 presumably has a provision that if more shares are tendered than the purchaser is willing to buy, the total number of shares purchased should be prorated among all persons who tendered. There are many problems inherent in such a requirement, and it may be that the bill as adopted by the Senate either eliminated the requirement or placed necessary restrictions on it. Certainly when there is an accumulation in the market there is no such opportunity for all shareholders to sell a proportionate part of their holdings. In the case of the Occidental public invitation for tenders, its offer was for more shares than were tendered and it purchased every share tendered. Consequently there was no need for the application of any pro rata purchase rule. It would appear to us to be unwise to insert a pro rata purchase restriction in the proposed rule. When, as and if Senate Bill 501 becomes law, it will of course cover all invitations for tenders. Meantime we would urge that

there is no need for such a condition in the proposed rule.

(f) Senate Bill 501 refers to disclosure in the public tender offer of any agreements or plans for change of management or business. Whatever the requirements of Senate Bill 501 are when eventually passed, they will of course be incorporated in future tender offers. There is no such information given to the public when shares are accumulated on the market. In the case of the Occidental tender offer, as is developed in detail hereinafter, Occidental assiduously but unsuccessfully sought a merger with Kern and there were no agreements or plans about changing directors or business. Consequently there was nothing to be disclosed about changes in management, liquidation and the like. As developed in detail hereinafter, the option on Tenneco preference stock was granted by Occidental to Tenneco's subsidiary long after the tenders pursuant to the offer had ceased and long after Kern had announced (on May 19, 1967) its contractual obligation to merge with Tenneco. Again, any such requirements on tender offers should be left to the proposed legislation and not inserted in a rule which we trust will affect both past and future transactions. When the new law is passed *all* tender offers will be in accordance with it and there will be no need for incorporation of such restrictions in the rule.

(g) We understand that Senate Bill 501, at least as we last saw it prior to adoption, required that the person inviting tenders disclose the source of its funds if other than bank loans in the ordinary course of business. Occidental's funds for the acquisitions of Kern stock were from bank loans in the ordinary

course of business. This was confirmed to the Securities and Exchange Commission in the letter of June 22, 1967 from Occidental by its attorney, Meyer Feldman, Esq., to Mr. Lawrence Williams, Branch Chief, Division of Trading and Markets, Securities and Exchange Commission, Washington, D. C., with respect to the non-applicability of Regulations T and U. The pertinent parts of that letter are as follows:

> "On May 8, 1967 Occidental offered to purchase until June 8, 1967 up to 500,000 shares of Kern County Land Company capital stock at a price of $83.50 per share to the seller. On May 15, 1967 Occidental offered to purchase an additional 500,000 shares on the same terms. On the date of the initial tender offer, Occidental had approximately $40,000,000 in cash in banks, as well as lines of credit with banking institutions totaling approximately $100,000,000. On May 11, 1967, Occidental entered into loan agreements with each of three banks under which Occidental borrowed a total of $75,000,000. (The agreements with the three banks were filed as part of Occidental's Form 8-K Current Report for May, 1967.) These bank loans were unsecured. The loan agreements, and the notes issued by Occidental pursuant to them, do not refer to the Kern County stock and do not collateralize that stock or any other stock or other property of Occidental. Furthermore, the Kern County stock has not been pledged to secure any other loans. Occidental did, however, undertake promptly to sell an amount of new debt securities sufficient to retire the bank loans.

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"As of May 31, 1967, Occidental had purchased through its tender offer in excess of 886,000 shares of Kern County stock. All purchases under the tender offer were for cash and were made not through a member of any national securities exchange or any broker or dealer transacting business through such member, but through Occidental's tender agents, the Chase Manhattan Bank and Bank of America".

(h) As a protection against any clandestine use of inside information, a public tender offer which under the conditions of the suggested rule is at a price at least 25% above the market price would seem to be the best practical protection. An outsider cannot give detailed information about the company, but by such a public offer he gives the best possible notice to *all* shareholders of the corporation that there are facts and factors which give the corporation a much greater value than is reflected in the then market price. If there were an accumulation in the market, such notice would not come to the attention of most shareholders until many of them had already sold at lower prices.

We submit that, with the safeguards for the public which the suggested rule provides with respect to tender offers and the imminence of the adoption of Senate Bill S 501 which will provide similar safeguards, an exemption from 16b in the event of a merger within six months after the tender offer is a logical and much needed development.

Before concluding the explanation of why we limit our suggested Rule 16b-11 to the exemptions to those beneficial owners who acquired the securities pursuant to a public tender offer meeting certain conditions, we should make it clear that we would not be opposed to the Com-

mission expanding the exemption to *all* beneficial owners regardless of how they acquired their securities. This could be accomplished by omitting from clause (a) of the suggested Rule 16b-11 those conditions numbered 3, 4, 7 and 8. In that event the Commission might wish to change the language suggested at the bottom of page 7 of this statement to read somewhat as follows:

> "(a) The following transactions shall be exempt from the provisions of Section 16(b) as not comprehended within the purposes of said subsection, to wit: The disposition of an equity security of an issuer, by a person who is not at that time and who was not when he acquired the security a director or officer of the issuer, pursuant to a merger or consolidation to which such issuer is a party, if all of the following circumstances and conditions are fulfilled: • • • ".

The Absence of any Possibility of Inside Information by Reason of Owning more than 10% of the Equity Security of the Corporation When Acquired in a Public Invitation for Tenders is Best Illustrated by Occidental's Acquisition of Kern Stock.

1. Over several weeks of time prior to May 1, 1967, Mr. Eugene Reed, Senior Executive Vice President of Occidental, contacted Mr. "Larry" Reid, Executive Vice President of Kern, on a number of occasions, seeking to discuss a possible merger. Mr. Eugene Reed was constantly rebuffed. Meanwhile, in the middle part of April, 1967, the investment banker who was advising Occidental purchased from time to time some 1900 shares of the stock of Kern in the market for the account of Occidental. These shares were reported to the Securities and Exchange Commission by Occidental as owned by it.

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2. Late in April, 1967 it became obvious to Occidental that it could not succeed in getting the interest of Kern management unless it owned a substantial block of Kern stock. Rather than to try to acquire these through the market, Occidental decided to make a public invitation for tenders. Occidental had no access to a list of Kern shareholders so could not make direct approach to them. During the first week in May, 1967, space for advertising was reserved in the Wall Street Journal and other papers for Tuesday morning, May 9, 1967. The trading volume in the Kern stock on the New York Stock Exchange was proceeding at a few hundred shares per day. On Friday, May 5th, several thousand shares traded and the price of Kern stock on the New York Stock Exchange went up one and one-half points to $63⅜. It was felt that some leak must have developed and it would be necessary to make the public invitation for tenders on Monday instead of waiting till Tuesday. The decision was made on Sunday, May 7th. That same day the President of Occidental phoned to the president of Kern to advise him of Occidental's intention to make a public tender offer for Kern shares. On Monday morning, May 8th, the public invitation for tender of all or any part of 500,000 shares at $83.50 a share was released to Dow Jones and published on the broad tape. The newspaper advertisements were the next day because it was not possible to reserve the space for Monday morning's papers when the decision was made on Sunday to move the offer from Tuesday to Monday. There is attached hereto marked Exhibit 1 a copy of the public invitation made by Occidental.

3. On Wednesday, May 10th, Kern sent a letter to its shareholders to discourage Kern shares being tendered pursuant to the Occidental offer. The Kern letter stated in part:

> "We fully realize how tempting his [Occidental's] offer may seem. Your most obvious rea-

son for refusing to tender your shares, however, is simply the fact that you can do better.

"We have in hand at this time a number of offers from strong and reputable corporations to discuss merger possibilities . . . and your Board of Directors has been giving full consideration to such opportunities.

"Armand Hammer [Occidental], it must be admitted, has evalutated the Company better than have most outsiders. He fully appreciates the fact that our 1.8 million acres of land are carried on our books at a fraction of their market value and that no discovery value is assigned the oil reserves underlying our California lands. Obviously he, too, sees the growth ahead that we expect for KCL."

4. On Thursday, May 11, 1967, Occidental extended its offer to cover an additional 500,000 shares at the $83.50 price.

5. On Monday, May 15, 1967, Kern sent a letter to its shareholders wherein it stated in part:

> "Since we last wrote to you, a number of additional companies have indicated interest in possible merger with our Company.
>
> "Talks are under way with selected companies, but for obvious reasons we cannot at this time reveal the name of any corporation under consideration . . .
>
> "So we want you to know that we are working toward arrangements that should be far more beneficial to your interests than the Occidental tender offer."

6. Occidental continued to try to talk with Kern officers about a possible merger. Finally, in response to one of

the calls, the Kern officers advised that Kern was holding a directors' meeting at noon on May 19th to consider available offers of merger. On Friday morning, May 19th, Occidental made two proposals to the Kern management to merge the two companies on a basis of Occidental's issuing its preferred stock convertible into common stock of Occidental. Each offer was stated by Occidental to be the basis for negotiations, but Kern was unwilling to talk about either of them. Finally late on the day of May 19th Kern announced that its Board had voted to accept an offer of merger with Tenneco, Inc., and when Occidental inquired as to the terms they were told "Read about it in the newspapers". The Kern Proxy Statement of June 16, 1967 briefly describes on page 3 the public tender offer of Occidental, the analysis of various alternates including an "oral proposal from Occidental" and the acceptance by Kern of Tenneco's offer on May 19, 1967. Attached hereto as Exhibit 6 is a photocopy of an article from Business Week, July 22, 1967, setting forth Tenneco's account of the events, including the fact that Tenneco came into the negotiations after Occidental's public tender offer was made.

7. If any proof were needed that Kern stock was grossly undervalued before Occidental made its public invitation for tenders and that the management of Kern were not realizing the potential earnings from those assets, the terms of the Tenneco merger are conclusive on both points. The Plan provides for Tenneco to issue for each share of Kern capital stock a share of Tenneco voting preference stock bearing preferred dividends at $5.50 a year, convertible into 3.6 shares of Tenneco common stock after July 1, 1969, not redeemable for ten (10) years and then only at $110 per share plus accumulated unpaid dividends with the redemption price reduced $1 a year after ten years until the price reaches $100, and having a volun-

tary liquidation value of $110 or the lower redemption price and an involuntary liquidation value of $100. As announced on the face of the Kern proxy statement, in italics, the cumulative annual dividend rate of $5.50 "*is more than twice* the amount of *any annual dividend* paid on Kern County Land Company stock and is *higher* than *any previously reported annual per share earnings* of Kern County Land Company". Obviously Tenneco, from its inside position, was able to determine that under proper management the earnings of the Company could be greatly increased. Otherwise they surely would not have undertaken the obligation of a preferred dividend rate higher than *any* previous annual earnings of the company they were acquiring.

8. On Monday, May 22, 1967, Occidental requested the opportunity to inspect and make extracts of various books and minutes of the shareholders, directors and executive committee of Kern, including the minutes or documents examined at the meeting which had accepted the offer of Tenneco. Occidental also requested access to the stockholders list. Although Occidental was a 20% stockholder of Kern, these requests were refused. On May 25, 1967 Occidental filed a civil action in the Superior Court of California for the City and County of San Francisco, No. 579283, seeking access to the records which had been denied to it. It was during this period (see letter from Occidental to Kern dated July 14, 1967, a typographical error in which was corrected by a letter between the parties dated July 25, 1967, copies of which are attached hereto as Exhibit 2) that, based solely on its knowledge as an outsider and the difficulty of obtaining any additional information from Kern, Occidental decided it would not be warranted in making a better offer than that made by Tenneco.

9. Attorneys for Occidental realized that there were two potential 16(b) problems for Occidental. *First*, if,

despite all of the conditions on the Plan, the closing occurred sooner than six months after Occidental purchased the Kern shares pursuant to the invitation for tenders, it might be held that, with respect to that portion of such Kern shares in excess of 10%, the surrender of such shares at the time of closing the merger was a "sale". *Second,* there might be a 16(b) claim if the Tenneco preference stock was sold within six months after the closing. Occidental, having decided that it did not want to oppose the Tenneco merger on its merits, disliked the idea of opposing it solely to delay closing until the six months period had passed. Occidental counsel were hopeful that a rule might be obtained from the Securities and Exchange Commission under these particular circumstances, so that the first potential 16(b) claim would not arise even if there was a closing within six months. As to the second potential 16(b) problem, this could be avoided by delaying the sale of the Tenneco preference stock until six months after the closing or delaying the registration of such stock for a period of time. At various times during the week of May 29, 1967, Mr. Gardiner Symonds, Chairman of the Board of Tenneco, Mr. Walter R. Davis, Executive Vice President of Occidental (Dr. Hammer being in Libya), Albert Brown, Esq., counsel for Occidental, and F. Arnold Daum, Esq., counsel for Tenneco, met to discuss the entire situation. The result was the signing on June 2, 1967 of the option agreement between Occidental and Tenneco Corporation, a subsidary of Tenneco. Copy of such option agreement is attached hereto as Exhibit 3. The option would run for a period from 6 to 14 months. The price of the stock was to be $105 per share and the price for the option was $10 a share. The latter amount was to be returned if the merger was not consummated by July 31, 1968 and was to be applied to the purchase price of the stock if the option were exercised. These terms were negotiated at arm's

length and were based on advice from investment bankers as to the value of the Tenneco preference stock and the going price for a call on stock.

Mr. F. W. Hellman of Lehman Brothers was acting as investment banker adviser to Occidental on all matters concerning Kern and, later, Tennecco. He had accompanied the Executive Vice President of Occidental at the time Occidental made its specific offers of merger to Kern on May 19th. Sometime prior to the meetings in the week of May 29 between representatives of Occidental and Tenneco, Occidental requested Mr. Hellman's opinion as to what the market price of the Tenneco preference stock would probably be when issued. Investment bankers of a caliber of Lehman Brothers are constantly placing values on securities to be issued as an essential part of their underwriting undertakings. Mr. Hellman advised that in his opinion, under then current market conditions, the Tenneco preference stock could be expected to command a market price upon issuance of approximately $105 per share.

In a letter to the California Corporations Commissioner from Tenneco and Kern dated August 10, 1967, they stated:

> "It is believed on the basis of advice received from investment counsellors that the Tenneco Preference Shares to be issued to the Kern shareholders upon the closing of this transaction will have a market value, assuming market conditions remain as they are at present, of *not less than $100* per share. Occidental in the letter it delivered and read at the Kern shareholders meeting on July 17, 1967 stated its opinion that the Tenneco Preference Shares would ultimately be worth more than $105 per share."

With respect to the price of the option charged to Tenneco's subsidiary for the "call", Occidental sought

advice from Mr. Gould of the firm of Donaldson, Lufkin & Jenrette as to what the market price would be for such a call. Mr. Gould's firm, among other things, engages in the business of selling options. He advised that for a six-months option with the Kern stock selling around $94 a share, $10 per share for a call price of the Tenneco preference stock would be very reasonable. We have been advised by Mr. Gould that the call prices for six months vary from 10% to 16% and that he does not recall in ten years' time seeing one under 10%. Furthermore, this call was unusual in that the buyer of the call gets his money back if the Tenneco preference stock is not issued by July 31, 1968. He advised that on calls for when and if issued stock, the buyer of the call merely loses his money if the transaction is not consummated.

The price for the stock and the price for the call resulted from an arms length negotiation at prices determined in the usual manner in financial transactions. If further proof of this is needed, it is conclusively shown by the fact that Tenneco Corporation later disposed of the option between it and Occidental in an arms length transaction with unrelated parties for a payment of not less than the $8,866,230 paid by Tenneco to acquire the option. This is evidenced by the terms of the ruling obtained by Tenneco from the reorganization branch of the Internal Revenue Service setting forth the conditions under which the merger would be tax-free. Tenneco and Kern refused to furnish Occidental with a copy of the ruling until they were ordered to disclose the same by a Texas court shortly before the closing of the merger. A copy of such ruling is attached hereto, marked Exhibit 4, and the reference to the sale and sale price of the option appears on page 2. The merger has now been closed, Kern and Tenneco relying upon the opinions of their respective legal counsel that the conditions of the Internal Revenue ruling had been fulfilled.

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Probably all of the Tenneco preference stock resulting from the merger is still held by Kern, although it may have been delivered by Kern to the exchange agents. Obviously there has been no opportunity as yet for any trading in the new preference stock. On Friday, September 1, 1967, the first day after the closing, the only quote which we could obtain on such stock was through the investment banking firm of Kidder Peabody. They gave a quote from someone else of 99 bid, 101 asked. Anyone buying at 101 would, of course, not have to hold the stock, completely non-transferable, for four months as Occidental does.

10. The time schedule in the Plan was such as to permit the carrying out of certain understandings between Occidental and Tenneco even if, by chance, all the conditions of the Plan were fulfilled earlier than expected.

(a) The Plan provides that if the closing takes place on or before December 1, 1967, the Tenneco preference stock will be listed no later than December 31, 1967, but if the closing is later than December 1, 1967, the listing will be no later than thirty (30) days after the closing date. This was in order to permit Tenneco and Kern to carry out an agreement with Occidental that the Tenneco Preference Stock issued on the merger would not be registered prior to the exercise or expiration of the option from Occidental to Tenneco Corporation. If it were registered earlier, it would precipitate the second potential 16(b) problem mentioned above. The Commissioner of Corporations required Kern to send a letter to its shareholders advising them that, if there was a closing at this time, nevertheless it was the intention of Tenneco not to list the stock until sometime in December of 1967. A copy of such letter of Kern to its shareholders dated August 18, 1967 is attached hereto, marked Exhibit 5.

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(b) Occidental was hopeful that having done everything openly and fairly and obviously with no inside information, it would be possible to obtain a rule from the Securities and Exchange Commission that there would be no 16(b) problem arising from the surrender of the Kern shares pursuant to the merger. Furthermore, it did not expect the merger timetable to be rushed through in such a way as would precipitate a 16(b) problem by reason of the merger even if such rule were not obtained. The schedule of the merger agreement provides that the closing shall take place in San Francisco, California "on such date not earlier than September 30, 1967 and not later than December 31, 1967 as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon." This would have permitted until at least September 30 to obtain a new rule without its having to be retroactive and would even permit a closing on December 9 if such a rule were not obtained. While the Plan is attached to the proxy statement, on page 4 of such proxy statement the shareholders of Kern are advised that if the respective shareholders of Kern and Tenneco approve the Plan at the shareholders' meetings of July 17, 1967 and July 11, 1967 "it is expected that the sale of assets will be consummated on a date to be agreed upon during the period from September 30 to December 31, 1967". When Tenneco began to try to close early in August of 1967, the certificate described the preference stock had to be changed from that submitted to the shareholders of Kern and Tenneco in order to provide that the dividends on the preference stock would accrue from October 1, 1967 instead of from issuance as had originally been stated in all the documents.

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Leaving Out any Question of the Option for the Moment, Certainly the Surrender by Occidental of Its Kern Shares Pursuant to the Merger is Not a Sale Within the Purposes of Section 16(b).

At the time and under the circumstances in which Occidental acquired the Kern shares, as detailed on pages 14 to 20 of this statement, Occidental could not possibly have had any information which it acquired as a result of being the beneficial owner of more than 10% of the stock of Kern and, furthermore, Occidental would have had no opportunity to abuse such information if it had any. It was at all times held at arm's length by Kern and acquired substantially all of the stock pursuant to its public invitation for tenders within a period of 8 days. Occidental thereafter sued Kern to obtain information but eventually dismissed the suit in mid-June, 1967 without having obtained the information it sought. Likewise anyone else making a tender offer within the strict limitations of the suggested rule would not have an opportunity to obtain or to use unfairly inside information gained by reason of its stock ownership in violation of the purposes of Section 16(b).

In the absence of any possibility of its having obtained information by *reason of its relationship* as a greater than 10% stockholder of Kern, should Occidental not be in the same position as someone who held 9% of the stock of Kern at the time of acquisition even though, by reason of intervening circumstances other than purchases, such a person would be a greater than 10% owner at the time of the merger? The requirement of his being a more than 10% owner at both the time of acquisition and disposal would appear to be tied into the requirement that he be presumed to have inside knowledge by reason of that relationship at both ends of the transaction.

However that may be, certainly Occidental could not have used any inside information it obtained as a more than

10% shareholder in exchanging its Kern shares for Tenneco shares in a merger which was approved by the requisite percentage of Kern shareholders, *exclusive* of Occidental. It had no inside information in fact. But even assuming that it might have had inside information, how could it possibly have made unfair use of that information when you have a merger which is binding on all shareholders and which is passed regardless of the vote or non-vote of Occidental thereon?

The Making of the Option Should Not in any Way Affect the Requested Exemption for the Exchange of the Kern Shares for Tenneco Preference Stock as a Result of the Closing.

The thought has been expressed by some of the members of the staff of the Commission that, if it were not for the option, the request for the exemptive rule has substantial merit. However, they say that the option price might constitute a bonus which Occidental obtained by reason of its position, over and above what the other shareholders obtained, and therefore they have doubts as to whether an exemption should be granted on the merger transaction. We would like to point out several reasons why the requested exemption should not be denied on this ground.

1. As has been pointed out before, the price of the stock and the price of the option in the Option Agreement were not the result of any pressure but were fixed by experts in the field as the "going prices". If there were any pressure it would be on Occidental, not by Occidental. Occidental was in the position of having lost its bid to merge with Kern. It would have over seventy five million dollars of its assets tied up in a minority position with Tenneco but, being a 20% owner of one class of

equity security of Tenneco, it would have to find a private buyer who would take the shares for investment or try to induce Tenneco to register the shares so that it could sell them on the market. Occidental may still be in that position if the option is not exercised, but if the market price keeps up it is hopeful that the option will be exercised. This is particularly likely since Tenneco Corporation has disposed of the option for at least as much as it paid. Tenneco still refuses to disclose who acquired the option.

2. The purpose of Section 16(b) is to prevent a beneficial owner from making "unfair use of information" which it has obtained as such beneficial owner. This obviously is to protect the person with whom such beneficial owner deals. Occidental did not negotiate the option with uninformed members of the public, but directly with Tenneco. We submit that it is preposterous to even imagine that Occidental had any inside information which was not equally available to Tenneco. As we have seen before, Tenneco was given every possible bit of information about Kern as recited in the merger Plan. Any unfair use of information would be by Tenneco, who was on the inside, against Occidental on the outside.

3. Undoubtedly any of the Kern shareholders could have sold a call on the Tenneco preference stock, when and if issued, on terms at least as favorable as Occidental obtained *provided* they were willing to agree not to dispose of either their Kern stock or their Tenneco stock for a period which might extend from 6 to 14 months, regardless of what the market might do in the meantime. As a matter of fact, it appears probable that the other

shareholders could have made a better deal in that the usual price of a call on when-issued stock is not repayable if the main transaction is not consummated.

4. While one of the conditions which would terminate the option was the non-consummation of the merger by July 31, 1968, the closing on August 31, 1967 leaves Occidental with Tenneco preference stock just like that received by the other Kern shareholders, but with this major difference: Occidental cannot transfer that stock until the option expires December 31, 1967 and meanwhile whatever value the stock has is still subject to the fluctuations in the market.

It can be expected that the option will be exercised if the market price of the stock is 95 or above next December, in which event Occidental will get 105 (including the price paid for the option) whether the market price available to the other shareholders is then 97, 102, 110 or 115. They may therefore be able to dispose of their stock at a price either more or less than the gross amount Occidental receives. But do not overlook the fact that because of Occidental's public tender offer and an investment of over $75,000,000, each of the other Kern shareholders will receive a profit much greater than Occidental. They will each get a profit of the difference between the $63.50 price of the Kern stock on May 5, 1967 and what they sell it for as above described. Occidental's profit is limited to the difference between 85 and 105 which is probably about half what the other shareholders will receive.

If on the other hand the stock is below 95 in December, it is probable that the option will not be exercised. Presumably the third party purchaser of the option does not think this is likely or it would not have paid the option price or more to obtain the option from Tenneco. But

even if the option is not exercised, the other shareholders are bound to receive more profit than Occidental, whose activities and investment made such profit possible. Assuming a December price of 90, the other shareholders will make a profit of the difference between 63.50 and 90 or a total of $27. Assuming that Occidental can sell the stock at all, it would probably be at something below the then market price. But even if it were able to sell at 90 and add the $10 per share option price, this would give it a total gross recovery of $100. Its cost was $85 so it would make only $15 per share. Meantime it has had the risk of being required to keep the stock until the decline occurred, while all other shareholders are at perfect liberty to dispose of their stock now.

If the Acquisition of the Tenneco Preference Stock as well as the Disposal of the Kern Stock, Both as a Result of the Merger, Were Exempted in the Proposed Rule, Then There Would be no Necessity for Delaying the Listing of the Tenneco Preference Stock

Obviously Occidental could not give an option to Tenneco to acquire as early as December, 1967 the stock which Occidental would receive when and if the merger was consummated *if* this would precipitate a second 16(b) problem, to wit, the sale of a listed Tenneco preference stock within six months after the closing of the merger. To make possible a December exercise of the option it was necessary that Tenneco agree not to register the Tenneco preference stock until after the option was exercised or had expired. A schedule of dates in the Plan and in the proxy statements was chosen to make this possible. The Commissioner of Corporations of California required Kern to advise its shareholders of the December listing date. (Exhibit 5 hereto.)

Whether or not the requested exemptive rule for the surrender of the Kern stock in the merger is adopted, the

exemption from 16(b) of the Tenneco preference stock will remain so long as it is not listed. This exemption is not dependent upon whether the suggested rule is passed. However, the Commission could readily obviate the necessity for delaying listing by including in the exemption from Section 16(b) the acquisition of the Tenneco preference stock in the merger as well as the surrender of the Kern stock.

This would not mean that Occidental could immediately sell its Tenneco preference stock. It will have to hold that stock in any event until the option is exercised or expires in December. Furthermore, the exemption of the rule as now drawn would be lost if Occidental disposed of any of its Tenneco preference stock (listed or unlisted) within six months of the time it bought its Kern stock. Meanwhile, however, the extension of the exemption to the Tenneco preference stock acquired from the merger would permit the current listing of the Tenneco preference stock for the benefit of all other shareholders.

We are not requesting this extension of the exemption, but of course would feel that the rule had been improved if the Commission chose to extend its exemption. It will obviate delays in listing, not only with respect to the Tenneco preference stock, but in many other transactions involving other companies.

The Suggested Rule is Limited to Mergers which are "Involuntary" with Respect to the Particular Beneficial Owner Involved, to the Extent that the Merger must have been Approved by a Vote of Security Holders Owning a Majority of All of the Outstanding Securities Entitled to Vote, Exclusive of the Vote of such Beneficial Owner

The suggested rule provides in condition 5 of subsection (a) thereof that the merger must be approved by the vote or written consent of the holders of at least a majority of

all securities entitled to vote on the transaction *without counting in such majority any vote or consent of the beneficial owner.* That would mean that, if a beneficial owner had 25% of the votes, the holders of more than ⅔rds of the rest of the votes would have to vote in favor of the transaction in order for their vote to be a majority of all of the outstanding securities. It may be that the Commission would prefer to change such majority requirement to such percentage as was required by the applicable state law or articles of incorporation. This was not done for the reason that (i) it might be wholly impractical in view of the fact that there are always a certain number of shareholders who cannot be found or for other reasons do not vote, and (ii) it does not seem necessary in order to assure that the transaction is substantially "involuntary" so far as the beneficial owner is concerned. If the holders of a majority of all of the outstanding securities vote for a plan, excluding the beneficial owner, then the beneficial owner could not gain a majority vote against the plan without changing some of those votes.

At the stockholders meeting of Kern held on July 17, without Occidental voting at all, 99.27 percent of the votes cast were in favor of the merger as contrasted with .73 percent against. Such favorable vote was 70.18 percent of the total shares outstanding.

The question was asked as to what proportion of the total votes would be necessary to effectively influence the result. Is it 10%, 20%, 30%? The answer is that it is not a percent at all. The president of the corporation with ½ of 1% of the votes may be the most influential; and a party with 20% of the vote may have practically no influence on the outcome. It is rather the terms of the merger which are being voted on, and their monetary appeal to the stockholders, which determine the outcome. The condition which we have suggested is merely to take the vote of the

beneficial owner out of the scale in determining which way the other stockholders wish it to tip.

It can be said that a holder of 10, 20 or 30 percent of the stock would be in a position to wage a proxy fight and, adding the proxies he obtained to his own vote, could thereby block the merger. This is merely saying that, in the absence of the suggested rule, a beneficial owner should play a charade of opposing a sound merger in order to delay its consummation until at least a six months period expires after he acquired his shares in a public invitation for tenders. This does not seem to us to be a tenable alternative for the suggested rule. It would be insisting that, to avoid 16(b) liability, every beneficial owner should play "dog in the manger" regardless of how favorable the merger might be for all of the other security holders. We feel that subtracting the beneficial owner's vote in determining that a majority of *all* the stockholders approved the merger is ample protection. Such a vote could not be obtained if the beneficial owner had such a large proportion of the shares —say 40%—that a majority vote by others of all securities outstanding could not in practice be obtained from the remaining stockholders.

As stated on page 8 we are suggesting the addition to condition 5 that the terms of the plan be binding upon all stockholders. This would be implied but it would be equally satisfactory to include it specifically in the condition.

None of the Causes of Action in any Pending Suits Would be in any way Prejudiced by the Adoption of the Proposed Rule

We refer to the "causes of action" as not being prejudiced because, while there are two suits now pending asserting particular claims, others might choose to assert the same causes of action in other litigation, and it would not be the intent that the proposed rule would prejudice any of these.

Exhibit T, Annexed to Foregoing Affidavit

There are two pending suits which raise questions not involving the limited issue presented by the suggested rule:

1. In Continental Realty Company vs. Occidental Petroleum Corporation, Kern County Land Company and Tenneco Inc., in the Superior Court of Los Angeles County, the plaintiff seeks recovery of the price paid by Tenneco Corporation to Occidental for the option, as well as punitive damages, based on the claim that this amount was not paid for the option but was paid to purchase Occidental's non-opposition to the merger. Recovery is sought on the ground that this constituted a violation of a fiduciary duty of Occidental to oppose the merger. We think this suit is not based on sound grounds, but this would be left to the decision of the court and would not be affected by any provision of the proposed rule.

2. In Stephen Abrams vs. Occidental Petroleum Corporation, Tenneco Inc. and Kern County Land Company in the United States District Court for the Southern District of New York, Civil Action File No. 2858, filed July 25, 1967, the causes of action are based on the contention that the option entered into by Tenneco Corporation and Occidental dated June 2, 1967 itself constituted (for the purposes of Section 16(b)) a "sale" at the date of the option, of the shares of a stock which were the subject of that option. Such suit was filed more than a month before the closing of the merger between Kern and Tenneco. We are confident that it will be held that the option was not a "sale" for the purposes of Section 16(b), but this will be left to be decided by the court and is not affected by the suggested rule.

While the application of the rule is limited to the disposition of the Kern stock at the closing of the merger, should the Comission adopt the rule it might wish to do so

with a general release statement or a letter to Occidental, Kern and Tenneco which would say something as follows:

> "The Commission has not considered in connection with the issuance of Rule 16b-11, and in adopting such rule takes no position on whether or not—
>
> "(a) The Option granted by Occidental to Tenneco Corporation under date of June 2, 1967 with respect to 886,623 shares of Tenneco preference stock was itself a 'sale' for the purposes of Section 16(b) of the Securities Exchange Act of 1934, or
>
> (b) Occidental has received or will receive, by reason of the option price paid by Tenneco to Occidental for such option, any net consideration over and above what other Kern shareholders are entitled to receive and if so whether or not such option price is recoverable by Kern or Kern shareholders."

Conclusion

We renew our request that suggested Rule 16b-11 be adopted by the Commission with the changes suggested herein and such others as the Commission and its staff may deem appropriate. Clearly Occidental could have had no inside information when it made its public invitation for tenders and, in dealing with Kern and Tenneco either with respect to the option or the merger, it not only had no inside information but if inside information were to be assumed Occidental could not possibly have used it unfairly against such giant insiders.

The suggested limited exemption for dispositions in mergers would complement the two *merger exemptions* from 16(b) already adopted as rules (Rule 16b-6(c) and Rule 16b-7)), although still far short of the general and unrestricted exemption for mergers requested by the Bar of the City of New York.

Exhibit T, Annexed to Foregoing Affidavit

The absence of such a limited rule as we are suggesting will make legitimate public tender offers practically impossible. Large sums must be invested, the usual market risks taken, and if a merger consummated by some other person entails a windfall payment to that other person of a 16(b) liability, a responsible company would seldom be willing to take this additional risk.

The suggested rule would not only provide a fair balance between those making a public tender offer and an antagonistic management, but would make unnecessary a "dog in the manger" position by one who was not successful in bringing about a merger in order to delay the merger for six months and the listing of the security for an additional period.

At the hearing on August 29, 1967, counsel for Kern and Tenneco reiterated their position that they are not objecting to the adoption of the suggested rule, nor are they requesting it. However, such counsel said that they would feel obliged to litigate the possible liability of Occidental to Kern if the suggested rule is not adopted (any recovery passing to Tenneco under the Plan). Consequently adoption of the rule will obviate long years of litigation which, we believe, all would agree should not within the purposes of 16(b) result in a payment by Occidental to Tenneco under the circumstances of this transaction.

Finally, in view of the fact that Tenneco and Kern closed the merger on August 31 after the hearing but before the filing of this statement, we urgently request that any rule adopted be expressly made retroactive except as to judgments entered. There are no such judgments at the present time.

Respectfully yours,

GIBSON, DUNN & CRUTCHER
By Herbert F. Sturdy
HERBERT F. STURDY

HFS:mms

Exhibit U, Annexed to Foregoing Affidavit

(Letter, Dated June 6, 1967)

Law Offices of
Pillsbury, Madison & Sutro
Standard Oil Building
225 Bush Street
San Francisco, California 94104

Telephone 421-6133
Area Code 415

June 6, 1967

F. Arnold Daum, Esq.
Messrs. Cahill, Gordon, Sonnett,
Reindel & Ohl
80 Pine Street
New York, N. Y. 10005

Dear Arnold:

Late yesterday afternoon Phil Loomis of the Securities and Exchange Commission called me to discuss the proposed rule that the SEC was considering to give Occidental some relief in the situation in which it found itself. Phil wanted a play-by-play account of the tender offer and the chronology in which the events surrounding the tender offer occurred. I gave him this. We then discussed the position in which Occidental found itself. He was sympathetic. He was most impressed by the fact that the only alternative that Occidental had was to commence every kind of litigation it could reasonably bring and attempt to stall the consummation of the Tenneco-Kern transaction for six months. Obviously this would be disadvantageous to the other Kern stockholders. Accordingly, Phil thought that the Commission would be impressed by Occidental's decision to forego the litigation if it could get the exemp-

tion proposed. In this connection he thought it would be very helpful to the Commission if Kern also advised the Commission that it thought Occidental's request for the exemption was reasonable under the circumstances, in view of the fact that this solution had the tendency to terminate the litigation. I pointed out to him that we had a problem not only with the "merger" being considered a disposition, but also the taking of the Tenneco stock being considered an acquisition. As we had proposed the rule and, as we had understood from Myer Feldman, we were going to be granted an exemption at both ends. It is not clear that the rule under consideration gives us the relief as to the taking of the Tenneco shares. In any event, I should appreciate your calling Phil Loomis and telling him that Tenneco is sympathetic to Occidental's position. Also if you could tell him that Kern likewise thinks that Occidental's position is not unreasonable, this would be helpful. If he wants something more from Kern than this perhaps you are in a position to ask the Kern people for expression of its view on this point. I find that I am in no position to talk to the Kern people about this.

Since my letter of yesterday sending you the suggested amendment to the Option Agreement I have been thinking some more about this, and perhaps the amendment should actually change the option from Tenneco shares to Kern stock. If we cannot work this out, it may well be that the option will have to be completely changed to provide that it cannot be exercised until after six months of the date of the consummation of the Plan of Reorganization between Kern and Tenneco.

Yours very truly,

Al

Albert J. Brown

Exhibit V, Annexed to Foregoing Affidavit

(Letter, Dated June 16, 1967)

Law Offices of
Pillsbury, Madison & Sutro
Standard Oil Building
225 Bush Street
San Francisco, California 94104

Telephone 421-6133
Area Code 415

June 16, 1967

By Hand
Richard J. Archer, Esq.
Messrs. Morrison, Foerster,
Holloway, Clinton & Clark
120 Montgomery Street
San Francisco, California 94104

Dear Dick:

I have been advised by F. Arnold Daum, Esq., counsel for Tenneco Inc., that the Agreement and Plan of Reorganization between Tenneco and Kern County Land Company provides that Tenneco has until December 31, 1967, to list the Preference shares being delivered to KCL. The agreement further provides that in the event the sale of assets does not occur prior to December 1, 1967, Tenneco has 30 days following the sale of assets to effect the listing.

While the foregoing provision does not obligate Tenneco Inc. to delay listing until the option granted by Occidental Petroleum Corporation has been exercised or expired, Mr. Daum advised me, and indicated that he had

assured Al Brown, that the listing would not be effected until after the option is exercised or expires. Mr. Daum also advised me that his client was aware of and had agreed to the assurances given by Mr. Daum.

On the basis of the foregoing, you should take prompt steps to cause the various actions brought by Occidental Petroleum Corporation against Kern County Land Company to be dismissed.

Very truly yours,

Bruce
BRUCE ALAN MANN

cc: F. Arnold Daum, Esq.
Dr. Armand Hammer

Exhibit W, Annexed to Foregoing Affidavit

(Letter, Dated August 9, 1967)

Law Offices of
Morrison, Foerster, Holloway, Clinton & Clark
120 Montgomery Street
San Francisco 94104
Telephone Area Code 415
421-5070

August 9, 1967

Dr. Armand Hammer, President
Occidental Petroleum Corporation
10889 Wilshire Boulevard
Los Angeles, Calif. 90024

Re: *Kern County Land Co.*

Dear Dr. Hammer:

Enclosed herewith is a copy of a letter dated June 16, 1967, from Bruce Mann to me, copies of which went to Daum and to you. I interpret Bruce's frequent references to listing to include registration and because of the fact that this letter went to both you and Daum, and was the basis for our dismissing the lawsuits against Kern, it constitutes a contract.

Sincerely,

Dick
Richard J. Archer

RJA:LS
Encl.
cc: Richard H. Wolford, Esq.
w/encl.
Given to AH

Exhibit X, Annexed to Foregoing Affidavit

(Temporary Restraining Order, Issued August 23, 1967 and Extension Thereto, Dated August 26, 1967)

No. 23170

In the District Court of Midland County, Texas

142nd Judicial District

Kern County Land Company, *et al.*,

vs.

Harjean Company, *et al.*

Temporary Restraining Order

The State of Texas:

To: Harjean Company, a corporation; Geo. T. Conly; A. Wayne Peters; Harry Volpe; CMC Corp., a corporation; and Occidental Petroleum Company, a corporation, individually and as shareholders of Kern County Land Company and as representatives of the class constituting all of the shareholders of Kern County Land Company; Tom S. Milam; George W. Dupree; James H. Milam; R. K. Harty; Max C. Addison; J. Orville Smith; A. Doyle Justice; William R. Moss; Joe V. Boerner, Cecil C. Kuhne; Joe H. Nagy; and Brad Crawford, Jr.

Whereas, Kern County Land Company, Tenneco Inc., and KCL Corporation filed their petition in the District Court of Midland County, Texas, on the 23rd day of August,

Exhibit X, Annexed to Foregoing Affidavit

1967, in a suit styled Kern County Land Company et al. v. Harjean Company et al. and numbered 23170 on the docket of said Court wherein Kern County Land Company, Tenneco Inc., and KCL Corporation are plaintiffs, and Harjean Company, a corporation; Geo. T. Conly; A. Wayne Peters; Harry Volpe; CMC Corp., a corporation; and Occidental Petroleum Company, a corporation, individually and as shareholders of Kern County Land Company and as representatives of the class constituting all of the shareholders of Kern County Land Company; Tom S. Milam; George W. Dupree; James H. Milam; R. K. Harty; Max C. Addison; J. Orville Smith; A. Doyle Justice; William R. Moss; Joe V. Boerner, Cecil C. Kumne; Joe H. Nagy; and Brad Crawford, Jr. are defendants, alleging that defendants are attempting to and will unless restrained continue to relitigate issues already decided by this Court in Cause No. 23128 now pending on the docket of this Court entitled CMC Corp. et al. v. Kern County Land Company et al., by means of a multiplicity of suits involving the same subject matter by or against the class constituting the shareholders of Kern County Land Company and that such action and course of conduct will, unless restrained, cause immediate and irreparable injury, loss, and damage to plaintiffs before notice can be served on the defendants; and

WHEREAS, on the 23rd day of August, 1967, the Honorable Perry D. Pickett, Judge of the 142nd District Court of Midland County, Texas, upon the presentation of such sworn petition entered his fiat upon plaintiffs' petition granting a temporary restraining order all of which is more fully shown by a true and correct copy of plaintiffs' petition and the Judge's fiat thereon attached hereto and made a part hereof for all purpose as if quoted herein; and

WHEREAS, plaintiffs have executed and filed with the Clerk of this Court their bond in the sum of $100,000.00

conditioned and payable as required by law and the order of this Court:

Now THEREFORE you and each of you are hereby commanded to take notice of such petition and fiat and to obey and execute the order of the Judge of this Court and that you so refrain from:

(a) Further appearing in, prosecuting or taking any other action, direct or indirect, except for the purpose of dismissing Cause #5961 heretofore filed in the District Court of Knox County, Texas, or Cause #1272-L filed in the United States District Court for Nebraska, Lincoln Division; or

(b) Directly or indirectly initiating any legal action or proceedings before any court or administrative body or officer with the purpose or effect of interfering with the closing or consummation of the Agreement and Plan of Reorganization of June 1, 1967, executed by plaintiffs and as described in plaintiffs' petition; or

(c)Directly or indirectly prosecuting any legal action or proceeding before any court or administrative body or officer with the purpose or effect of interfering with the closing and consummation of the said Agreement and Plan of Reorganization; or

(d) Directly or indirectly interfering in any manner with the closing and consummation of the said Agreement and Plan of Reorganization;

until and pending the hearing of and on such petition and plaintiffs' prayer for temporary injunction in the Courtroom of the 142nd Judicial District Court of Midland County, Texas, in the City of Midland, Texas, on the 25th day of August, 1967, at 9:00 o'clock A.M. when and where

you are hereby ordered to appear and show cause why the temporary injunction should not be granted upon said petition effective until final decree in such suit.

ISSUED UNDER MY HAND AND SEAL OF SAID COURT at my office in the City of Midland, Texas, this 23rd day of August, 1967.

/s/ RUBY MURRAY
RUBY MURRAY
Clerk, District Court
Midland County, Texas
By /s/ IRENE PERRYSON
Deputy

No. 23170

IN THE DISTRICT COURT, MIDLAND COUNTY, TEXAS

142ND JUDICIAL DISTRICT

KERN COUNTY LAND COMPANY, *et al.*,
Plaintiffs,

vs.

HARJEAN COMPANY, *et al.*,
Defendants.

ORDER OF THE COURT

ON THIS, the 26th day of August, 1967, during the course of the hearing on the application of the Plaintiffs for a temporary injunction in the above entitled and num-

bered cause, it appearing to the Court that it is necessary to recess said hearing until 9:00 A.M. on the 30th day of August, 1967; and, the Court having heretofore issued its temporary restraining order in this cause which is still in full force and effect; and, the Court being of the opinion that said temporary restraining order should remain in full force and effect pending the outcome of this hearing;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that the temporary restraining order issued out of this Court on the 23rd day of August, 1967, against all defendants in this cause, be, and the same is hereby, Extended in full force and effect until 9:00 A.M. on the 30th day of August, 1967, and from day to day thereafter until this hearing is concluded.

PERRY D. PICKETT
Judge Presiding

Reply Affidavit of David R. Hyde, Read in Support of Foregoing Motion

(Document No. 169)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

State of New York }
County of New York } ss.:

David R. Hyde, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl, attorneys for defendants Tenneco Inc. and KCL Corporation (the Tenneco subsidiary now known as Kern County Land Company). I submit this affidavit, together with the annexed affidavits of Mr. Gardiner Symonds, Chairman of the Board of defendant Tenneco Inc., and Mr. Charles S. Taylor, Jr., Vice President and Associate General Counsel of Tenneco, Inc., in reply to the answering affidavits of Dr. Armand Hammer and Mr. Simon Rose submitted on behalf of defendant Occidental Petroleum Corporation ("Occidental").

2. The annexed affidavits of Mr. Symonds and Mr. Taylor refute two charges made in Occidental's answering papers, *i.e.*, that in closing the Tenneco-Kern Agreement and Plan of Reorganization on August 30, 1967 (the event giving rise to Occidental's 16(b) liability), Tenneco acted (a) in breach of an agreement between Tenneco and Occidental not to close until Occidental's 16(b) problems were resolved by the SEC or obviated by the passage of six

months' time, and (b) in violation of an order of a Texas court restraining the closing.

3. While Tenneco believes these defenses, which are actually estoppel defense, to be legally insufficient as defenses to an action under Section 16(b) of the Securities Exchange Act of 1934 (with the result that any factual controversies with respect thereto are irrelevant on a motion for summary judgment), we do not wish to leave Occidental's charges unanswered in the record, and to leave the atmosphere they seem designed to create hanging over this case.

4. Thus, Tenneco submits herewith the affidavits of Mr. Symonds and Mr. Taylor (who, unlike Occidental's affiants, have "personal knowledge" of these matters, Rule 56(e), F.R.C.P.) conclusively showing the complete lack of any factual basis for Occidental's estoppel defenses.

DAVID R. HYDE

(Sworn to March 8, 1968.)

Reply Affidavit of Gardiner Symonds, Read in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GARDINER SYMONDS, being duly sworn, deposes and says:

1. I am Chairman of the Board and chief executive officer of defendant Tenneco Inc. and I submit this affidavit in reply to certain allegations contained in the answering affidavit of Dr. Armand Hammer, Chairman of the Board, President and chief executive officer of defendant Occidental Petroleum Corporation ("Occidental").

2. Dr. Hammer's affidavit purports to attest to an alleged agreement between Occidental and Tenneco that the Tenneco-Kern Agreement and Plan of Reorganization dated June 1, 1967 would not be closed until more than six months had elapsed after Occidental's last acquisition of common stock of Kern County Land Company—unless the SEC adopted the exemptive rule Occidental was seeking. This, it is said, was to obviate any 16(b) liability on the part of Occidental.

3. Neither Dr. Hammer's affidavit nor the companion affidavit of Mr. Simon Rose state who on behalf of Tenneco allegedly made the agreement not to close, to whom it was allegedly made, when it was allegedly made or where. Obviously, the alleged agreement must be an oral one since

Reply Affidavit of Gardiner Symonds, Read in Support of Foregoing Motion

it is not a part of the June 2, 1967 option agreement between Tenneco Corporation and Occidental (Taylor Aff., Ex. "A") nor is any other written agreement annexed to either of the answering affidavits.

4. Unlike Dr. Hammer, whom I have never met and never spoken to, I was present at and am personally familiar with all of the negotiations between Tenneco and Occidental preceding the execution of the June 2, 1967 option agreement. Neither Dr. Hammer nor Mr. Rose participated in any of these negotiations, and consequently cannot have any personal knowldege of what was agreed to by the parties.

5. The facts with respect to the option agreement are as follows. On May 23, 1967, following the announcement of Kern's acceptance of Tenneco's offer to acquire Kern's business and assets, Mr. Walter R. Davis, Senior Executive Vice President and Director of Occidental, telephoned me and asked to meet with me. I was given no indication as to what Mr. Davis wanted to discuss. Because of my schedule, such a meeting could not be arranged prior to May 30, 1967, the Memorial Day holiday, when I agreed to meet with Mr. Davis at my home in Houston, Texas. At that time Mr. Davis offered to sell Occidental's position in Kern to Tenneco at $105 per share. After satisfying myself that Occidental's price was a firm one, I agreed to this offer, subject to approval of counsel.

6. I then suggested to Mr. Davis that we hold a further meeting on June 1, 1967 in New York City at the office of Mr. F. Arnold Daum, a member of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl. Mr. Davis agreed to this and came to Mr. Daum's office on June 1, 1967 accompanied by his attorneys, Mr. Albert J. Brown and Mr. Bruce Alan

Reply Affidavit of Gardiner Symonds, Read in Support of Foregoing Motion

Mann, both members of the firm of Pillsbury, Madison & Sutro, San Francisco, California. At that time, Occidental's attorneys proposed that the parties enter into an option agreement exercisable after December 9, 1967 giving Tenneco an option to purchase at $105 per share the Tenneco Preference Stock which Occidental would receive as a Kern stockholder upon consummation of the Tenneco-Kern agreement. The cost of the option was to be $10 per share to be credited against the purchase price upon exercise of the option.

7. I agreed to the above terms and a formal written option agreement between Occidental and Tenneco Corporation embodying the above terms was then prepared by counsel. On June 2, 1967, the following day, Mr. Davis and I executed that agreement (Taylor Aff., Ex. "A").

8. At no time during any of my discussions or negotiations with Mr. Davis, or at any other time, did Tenneco agree to defer the closing of the Tenneco-Kern Agreement and Plan of Reorganization in order to accommodate Occidental's 16(b) situation.

9. The lack of any such agreement as that alleged in Dr. Hammer's affidavit is confirmed by a letter which Mr. Brown, one of Occidental's attorneys who acted on the option agreement, sent to Mr. Daum on June 6, 1967 following the execution of the option agreement. As pointed out in this letter (a copy of which is annexed hereto as Exhibit "A"), Occidental's attorneys informed the Securities and Exchange Commission on June 5, 1967 that if the SEC did not adopt the rule proposed to it by Occidental giving Occidental "some relief in the situation in which it found itself", then "the only alternative that Occidental had was to commence every kind of litigation it could rea-

sonably bring and attempt to stall the consummation of the Tenneco-Kern transaction for six months". Obviously, if Tenneco had agreed as part of the June 2, 1967 option agreement to defer the closing to accommodate Occidental, there would have been no occasion or necessity for Occidental to advise the SEC that it would be forced to bring law suits to "attempt to stall the consummation of the Tenneco-Kern transaction for six months".

10. I am also aware of the letter from Mr. Mann to Mr. Richard J. Archer (both of whom are attorneys representing Occidental) dated June 16, 1967 attached to Dr. Hammer's affidavit as Exhibit 5 which, it is claimed, evidences the alleged agreement. This letter refers exclusively to an understanding with respect to when the Tenneco Preference Stock to be issued to Kern shareholders would be listed for trading on the stock exchanges. As can be seen by the letter itself, it contains absolutely nothing about any agreement to postpone the closing of the Tenneco-Kern transaction. Indeed, the first paragraph of the letter notes that the closing may occur prior to December 1, 1967 (which would be within six months of Occidental's acquisition of some of Kern's stock) and makes specific provision for the possibility that the closing may occur at a later date. Again, if there was any agreement that the closing would not occur until after December 9, 1967 (the end of the six-month period), such agreement would certainly have been included in the letter.

11. To repeat, I categorically deny that Tenneco ever agreed in any way, shape or manner to postpone or otherwise schedule the closing of the Tenneco-Kern transaction to accommodate or obviate Occidental's 16(b) problems. I further categorically deny that Tenneco ever "exacted"

any option agreement from Occidental (Occidental 9(g) statement, p. 8). As pointed out above, Occidental itself proposed the option agreement, which proposal was accepted by Tenneco.

GARDINER SYMONDS

(Sworn to March 7, 1968.)

Exhibit A, Annexed to Foregoing Reply Affidavit

LETTER, DATED JUNE 6, 1967

(Same as Exhibit U, Annexed to Affidavit of David R. Hyde, printed herein at pages 239a to 240a.)

Reply Affidavit of George G. Montgomery, Read in Support of Foregoing Motion

(Document No. 176)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

State of California
City and County of San Francisco } ss.:

George G. Montgomery, being first duly sworn, deposes and says that:

1. I am and since September 1, 1967, have been chairman of the Board of Directors and a director of Kern County Land Company, a Delaware corporation, named as a defendant in the above action as KCL Corporation, a Delaware corporation, and make this affidavit on its behalf. I was chairman of the Board of Directors of the predecessor corporation, Kern County Land Company, a California corporation, named as a defendant in the above action by that name, from 1959 to its dissolution in October, 1967, and I also make this affidavit on its behalf.

2. *My involvement in the Occidental tender offer and its aftermath was in outline as follows*:

(a) When the Occidental tender offer to the shareholders of Kern County Land Company at $83.50 per share was announced to the public on Monday, May 8, 1967, after less than a day's notice to Mr. Dwight M. Cochran, President of the Company, by telephone call from Dr.

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Armand Hammer the prevoius day, Sunday afternoon, May 7, 1967, I was on my way back to the United States from a business trip to Australia and Europe. I was informed of the Occidental tender offer upon my arrival in New York on the afternoon of Monday, May 8, 1967. Immediately after my arrival I participated with Mr. Cochran and others in evaluating the situation created by the Occidental tender offer, and in conducting an intense and comprehensive consideration, study and analysis of the alternatives open to the Company to accomplish the best result for its shareholders. These steps included immediate, frequent and extensive consultation with the other officers and directors of the Company, with legal, investment and financial counsel, accountants and with representatives of other corporations who expressed interest in the Company, with the objective of determining the course of action for the Company which would be in the best interests of its shareholders.

(b) Among the steps taken by the officers and directors of the Company to deal with the situation created by the Occidental tender offer were discussons with representatives of various corporations, including Occidental (on May 17, 1967), which had expressed interest in possible corporate combination with Kern which might be more favorable to our shareholders than acquisition of control of the Company by Occidental on the basis of its tender offer. We had as objectives, among other things, a better value for the Kern shares, a tax-free transaction and avoidance of the consequences to non-tendering Kern shareholders of becoming minority shareholders in a Company controlled by Occidental.

3. *My involvement in the Tenneco offer was as follows*:

(a) On Monday, May 8, 1967, on my arrival in New York I first learned of the Occidental tender offer from my

son, George G. Montgomery, Jr., who met me at the airport. My son is a partner of the investment and brokerage firm of White, Weld & Co. in New York. Before leaving Paris I had arranged to have lunch with my son the following day, Tuesday, May 9, 1967, and did so. Mr. Frank Kernan, a senior partner of White, Weld & Co. in New York, whom I have known for a number of years, joined us at lunch. Mr. Kernan is a highly qualified and well-respected investment banker with great experience in financial matters and has been an adviser of Tenneco over the years. Mr. Kernan told me, during our lunch meeting, that after he learned of the Occidental tender offer he talked by telephone with Mr. Gardiner Symonds, Chairman of the Board of Tenneco Inc., and Mr. Symonds had stated that Tenneco might well be interested in discussing a proposal to Kern. Mr. Kernan said that he had been authorized officially by Mr. Symonds to express to me Tenneco's interest in Kern and to request that I call Mr. Symonds if Kern was interested in exploring a possible corporate combination with Tenneco. I returned to San Francisco the evening of Tuesday, May 9, 1967, and became engaged in the activities to which I have referred generally in the preceding paragraph 2. In the course of those activities, and after consultation with Mr. Cochran and the Board of Directors at its special meeting on Wednesday, May 10, 1967, I telephoned Mr. Symonds at the Homestead in Hot Springs, Virginia, in accordance with his invitation conveyed by Mr. Kernan. We arranged for a meeting between Kern and Tenneco officials to commence on the morning of Monday, May 15, 1967, at the Kern San Francisco office. Mr. Symonds and other Tenneco personnel made the trip to San Francisco for this purpose. At the agreed time Mr. Cochran, Mr. Enersen, a Kern director and a partner in the law firm which has advised Kern for many years, and I met officials of Tenneco, including Mr.

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Symonds and Mr. Wilton E. Scott, Senior Vice President of Tenneco, and discussed the extent of Tenneco's interest in Kern and in a general way the broad basis of a possible corporate combination between Kern and Tenneco. This meeting with Tenneco led to further discussions and investigations which continued from that time through May 18, 1967, during which time Kern and Tenneco officials and staff on various levels participated in one way or another. We told Mr. Symonds and Mr. Scott on May 15, 1967, in the course of those discussions that Kern was also discussing possible corporate combination with other corporations, whose identities we did not disclose. On Tuesday, May 16, 1967, Mr. Symonds told us that Tenneco would make a definite offer before the end of the week. We advised them that Tenneco, at that time, should make its best offer. The discussions concerned, among other things, a possible corporate combination on a tax-free basis through the issuance of a convertible preferred stock and included consideration of the following matters: whether Tenneco or its subsidiary, Tenneco Corporation, would be the issuing corporation, the dividend rate of the preferred stock, protection against dilution, the conversion ratio, the call features of the preferred stock, maintenance of Kern identity, status of the personnel and employees of Kern and other things. No decisions were reached and no offer was made at this meeting.

(b) These discussions and negotiations resulted in the submission by Tenneco to Kern's Board of Directors by letter dated May 18, 1967, and received on that date, of Tenneco's offer, which was an offer for the exchange, through transfer of Kern's assets, of one share of Tenneco Preference Stock for each Kern share, the Tenneco Preference shares to carry a $5.50 cumulative annual dividend, to be non-callable for 10 years and thereafter callable at $110, de-

creasing $1 each year thereafter to $100, with a right of conversion, after July 1, 1969, into 3.6 shares of Tenneco common stock, a liquidation value of $100 and other attractive features. Tenneco also indicated by an additional letter dated May 18, 1967, its position, stated in the preceding negotiations and discussions, that Tenneco wished to retain Kern's management and personnel, and to continue Kern's corporate identity, and that Kern's employee benefit programs would be continued for at least one year with an option to the employees thereafter of retaining such Kern programs or adopting Tenneco's benefit programs for employees. The Tenneco offer provided that in the event of acceptance by the Board, an Agreement and Plan of Reorganization would be drafted for submission to the shareholders. The offer was made with the statement that it had been approved by the Executive Committee of the Board of Directors of Tenneco and each individual member of the Board except one traveling in Europe who could not be reached. Tenneco requested in the offer that a meeting of the Kern Board be called at the earliest practicable date to consider its proposal and that immediately thereafter Kern notify Tenneco as to whether the offer had been accepted or rejected. Tenneco asked that if the offer be rejected its letter be returned without disclosure of the terms except to directors, advisers, management and personnel. A copy of the Tenneco letter offer of May 18, 1967 is set forth in Exhibit A to this affidavit in the minutes of the May 19th meeting. A copy of the additional Tenneco letter of May 18th is set forth as Exhibit B.

4. *The Occidental offer of corporate combination was as follows*:

(a) In late April, 1967, Mr. Herbert L. Reid, Kern's Executive Vice President, met with Mr. Gene Reid, Occi-

dental's Senior Vice President, at the invitation of the latter. At that meeting, Mr. Gene Reid raised the subject of possible combination between Kern and Occidental and requested that Mr. Herbert Reid discuss this subject with Mr. Cochran. Mr. Herbert Reid replied that he was dubious about the prospects for such combination but that he would report the conversation to Mr. Cochran. On or about Monday, May 1, 1967, the two Mr. Reids chanced to meet at a dinner in Bakersfield, California, and Mr. Herbert Reid reported that because of Mr. Cochran's absence from San Francisco, he had not been able to report to him concerning his conversation with Mr. Gene Reid. Mr. Herbert Reid was away from San Francisco for the remainder of the week of May 1, 1967 and had not yet had an opportunity to discuss with Mr. Cochran his conversation with Mr. Gene Reid when the Occidental tender offer was announced to Mr. Cochran by Dr. Hammer on Sunday, May 7, 1967.

(b) On Tuesday, May 16, 1967, Mr. Warren Hellman of Lehman Brothers, financial advisers to Occidental, telephoned me and requested a meeting in San Francisco for the purpose of making a written offer to Kern on behalf of Occidental, and we arranged a meeting for the following afternoon at Kern's offices in San Francisco. The above described telephone call from Mr. Hellman was the first time that anyone representing or acting on behalf of Occidental had contacted any Kern officer with respect to the possibility of combination between the two corporations since Dr. Hammer and Occidental's Executive Vice President, Walter R. Davis, had visited Kern's offices in San Francisco on May 8, 1967, at their own request, to discuss the matter with Mr. Cochran and other Kern representatives.

(c) On Wednesday, May 17, 1967, Occidental, through Walter R. Davis and Warren Hellman, came to the Kern

offices and made an oral offer to Mr. Cochran and me of corporate combination between Kern and Occidental, conditioned upon approval by the Board of Directors of Occidental, and with an expiration date of the close of business on Friday, May 19, 1967. Occidental's conditional oral offer was to be kept confidential unless and until accepted. As has since been revealed pursuant to litigation, it was an offer for an exchange of one share of an Occidental preferred stock in return for each share of Kern, the Occidental preferred stock to have a dividend of $3.50, to be callable in two years at $103.50 per share, to have a liquidation value of $100, and to be convertible into Occidental common at the rate of 1.25 shares of Occidental common for each preferred share. These terms as recorded by me at the time were read back to Mr. Davis and Mr. Hellman and approved by them. They stated that the terms of the offer were not open to negotiation as to dividend rate, conversion terms and liquidation value, but there could be some negotiation as to other terms. Mr. Davis told us on that occasion that if the Occidental offer were accepted it was Occidental's practice on acquisitions to retain management of the company acquired and cited his own experience in this respect.

(d) At approximately 11:30 A.M. on Friday, May 19, 1967, following a telephone call from Mr. Hellman, Occidental made an amendment to said oral offer increasing the conversion ratio from 1.25 to 1.4 shares of Occidental common stock. A further description of the Occidental offer is set forth in Exhibit A to this affidavit in the minutes of the May 19th meeting. The Tenneco and Occidental offers just described were the only definitive offers received by Kern for possible corporate combination after the Occidental tender offer. Kern respected the requests from

Tenneco and Occidental that their offers be kept confidential unless and until accepted.

(e) In the period between May 8 and May 19, 1967, various discussions or inquiries concerning possibilities of corporate combination took place between persons representing or connected with Kern and representatives of or persons inquiring on behalf of, the following companies and persons among others: W. R. Grace & Co., Litton Industries, Union Oil, American Standard, Household Finance, J. Ray McDermott, Sinclair Oil Company, Kerr-McGee, but no discussions other than those with Tenneco and Occidental led to any definitive offers.

5. *The facts regarding the Board's acceptance of the Tenneco offer were as follows*:

(a) On May 19, 1967, the Board met to consider the action which it should take. A copy of the minutes of that meeting, including a full description of the Tenneco and Occidental offers (and a copy of the Tenneco written offer), together with the opinion thereon of investment counsel, Morgan Stanley & Co., evaluating Tenneco's firm offer at $97 to $99 per Kern share and the Occidental conditional oral offer as amended at $90 to $92 per Kern share, is attached to this affidavit as Exhibit A. The meeting lasted almost five hours. All directors were present except Peter Cook, who was in Asia, William R. Hewlett, who was in Europe, and Thomas McDaniel, who was in Los Angeles and unable to attend.

(b) I opened the meeting with the statement that this was potentially the most important meeting which the Board had ever held, that the questions to be decided went to the fundamentals of the Company and its future, and that we were prepared to devote as much time as necessary

to fully explore and evaluate the situation, answer all questions that any director might want to ask, and receive the comments and views of all directors. I said that we would devote all the time needed to enable every director to obtain all the information he might desire in order to arrive at a decision and that, if this could not be accomplished in a single session, the meeting would be adjourned to another date. I pointed out that this was the fourth Special Meeting held by the Board since the Occidental tender offer was announced on the morning of May 8, that the directors had been kept informed as matters progressed, that for purposes of clarity a brief review seemed to be in order, and that, if there was any uncertainty on the part of any director as to the factual background, those facts and anything else which might be pertinent would be supplied. Mr. Cochran, Mr. Enersen and I then reviewed the events of the preceding two weeks, including the discussions with Tenneco and Occidental and with other companies which had not made definitive offers. A discussion followed and then I stated that there were four alternatives which the Board must take under consideration:

(1) Retain the status quo; continue to operate the Company as is, giving consideration to the potentials indicated by the Occidental offer, and meet the situation as it developed;

(2) liquidate Kern on a tax-free basis, which would require completion of the liquidation within a period of one year;

(3) accept the Occidental offer submitted verbally on Wednesday, May 17, by Messrs. Davis and Hellman to Messrs. Cochran and Montgomery, and revised as to one item by Hellman Friday morning, May 19th;

(4) accept the Tenneco offer discussed initially on May 15th by Messrs. Symonds and Scott and submitted in writing over the signature of Mr. Scott on May 18th.

(c) There followed a long and detailed presentation, with charts, documents and other data, led by Mr. John J. Hartmann, Kern's Financial Vice President, supported by Messrs. John F. Ahearn, Jr., Director of Corporate Planning of J. I. Case Company, Gregory H. Turnbull, Corporate Planner of Kern, and William C. Bodman, Corporate Planner of Kern, all of whom had participated with others in the compilation and preparation of the charts and data presented. These presentations analyzed in depth the proposal of Occidental, the proposal of Tenneco, and a comparison of the two with precise valuations of their content, together with an analysis of Kern's assets and liabilities. There followed an extended discussion in which all directors participated. Mr. Enersen commented on the legal aspects of the various alternatives. Messrs. Cochran, Enersen, Montgomery, Hartmann and others responded to questions and made comments with respect to other factors involved. The directors unanimously eliminated alternatives (1) and (2) as impractical and not in the best interests of the shareholders as compared to the other alternatives. It was agreed that the Board should approach its decision on two bases:

(1) Determine whether the Occidental or Tenneco offer was best for the Company and its shareholders and which of the two represented the greater value;

(2) determine whether it was in the best interests of the shareholders to accept either offer, considering each offer solely on the basis of its own merit and value as related to the asset value of the Com-

pany and without regard to the impact of the Occidental tender offer.

(d) Mr. Cochran again reviewed the terms of the two offers. The Board had been informed of the employment of Morgan Stanley & Co. as our financial advisers. The opinion of Morgan Stanley & Co. was presented to the Board and confirmed by Mr. John H. T. Wilson who attended portions of the meeting. Their written opinion was that the value of the Tenneco offer was equivalent to $97 to $99 per share of Kern, that the Occidental offer, as revised, had a value in the range of $90 to $92 per share of Kern, and that the Tenneco offer should be attractive to our shareholders. That opinion is attached to the minutes of the May 19th meeting in Exhibit A. The Board was fully advised of Tenneco's stated intention to retain the Company's management and personnel, continue its corporate identity and protect employee benefit programs and of Occidental's proposal to retain management.

(e) It was clear from the comparison that the Tenneco offer was substantially higher and more advantageous to the Kern shareowners than the Occidental offer. This was supported by the valuations and opinion of Morgan Stanley & Co., and was the unanimous view of the members of the Board. It was also the opinion of the Board that the Tenneco offer was an excellent one and that its acceptance was in the best interests of the Kern shareholders. This opinion also was supported by the advice and opinion of Morgan Stanley & Co. Following further discussions a motion was made by Director Ernest C. Arbuckle and seconded by Director Louis Lee Haggin II that in the judgment of the Board the Tenneco offer was a good, fair and reasonable offer and substantially better than the Occidental offer as amended, that the Occidental offer be

rejected, that acceptance of the Tenneco offer was in the best interests of Kern and its shareholders, that the Tenneco offer be accepted subject to the approval of the shareholders and that a meeting of the shareholders of record on June 1, 1967, be called for July 17, 1967, for the purpose of acting upon the Tenneco offer. I asked if any member of the Board desired further information of any kind in order to arrive at a decision and whether every member of the Board was ready for the question. All indicated that they were ready to vote and the motion was carried unanimously.

(f) Subsequently, the agreement with Tenneco was incorporated in a document entitled "Agreement and Plan of Reorganization" dated June 1, 1967, and duly executed by Kern, Tenneco Inc. and KCL Corporation, a newly formed Delaware corporation and a subsidiary of Tenneco Inc. The Agreement and Plan of Reorganization ("Plan") was subject to the approval of Kern's shareholders and copies of the Plan were sent to them with the proxy material for their July 17, 1967, special meeting.

6. *Occidental made demands for information after the Tenneco offer was accepted:*

(a) On Monday, May 22, 1967, the first business day after the acceptance of the Tenneco offer on Friday, May 19, 1967, Occidental began a series of demands upon Kern for various of the Company's books and records. On May 22, 1967, Occidental's Executive Vice President, Walter R. Davis, made demand upon Kern for the Company's minutes, books of account and share register. A copy of this demand and of the succeeding demands and actions by Occidental for Kern's records is set forth as Exhibit C to this affidavit. Kern promptly complied with the demand except for the demand for the share register, for which no

valid purpose had been stated. On May 25th Occidental, through its counsel, Richard J. Archer and Morrison, Foerster, Holloway, Clinton & Clark, filed a petition for writ of mandate in the Superior Court of San Francisco for the Company's share register and certain other papers.

(b) On May 29, 1967, Occidental, through its counsel, Richard J. Archer, made further demand upon Kern for books and records and other information, amounting in effect to almost all of the records of the Company (in Exhibit C). Kern proceeded to comply with said demand to the extent that it was appropriate to do so. In addition to supplying Occidental's representatives with its articles, by-laws, and minutes of meetings of directors, shareholders and executive committee, Kern made available its General Ledger, consolidating financial statements, consolidating journal entries, details of cash receipts from oil operations, supporting trial balances and other records. On May 31, 1967, Occidental filed another petition for writ of mandate for said documents last referred to. All of these demands and petitions for Kern's records are set forth in Exhibit C. Occidental's representatives numbering variously from one to five persons, examined Kern's records made available to them for six days without any court determination of Occidental's right thereto. Occidental subsequently voluntarily dismissed its court petitions (Exhibit C).

(c) Occidental's stated purpose in seeking these records, as shown in the demands, verified petitions and affidavits in Exhibit C was to satisfy itself that the terms of the Plan were fair to it as a shareholder of Kern. On May 19, 1967, Occidental stated in a Progress Report to its shareholders that the Tenneco offer was estimated to be equivalent to $105 per share (Exhibit D), and on June 5, 1967, it was reported in the public press that Occidental had decided not to oppose the Kern-Tenneco merger (Exhibit E). Occi-

dental later stated by letter to Kern read at the shareholders' meeting on July 17, 1967, that Occidental had no better offer to make (see para. 7 below).

7. *The facts regarding the shareholders' meeting on July 17, 1967, are as follows:*

(a) On July 17, 1967, the shareholders of Kern County Land Company voted at their special meeting, duly noticed for the purpose, to approve the Plan by a vote of 3,039,194 FOR and 22,338 AGAINST. The vote in favor of the Plan constituted 70.18% of the total number of shares entitled to vote at the meeting and over 99% of the shares voted.

(b) In the course of the meeting a representative of Occidental Petroleum Corporation requested and was given leave to read a letter at the meeting. After the meeting a further letter from Occidental Petroleum Corporation dated July 25, 1967, correcting an error in the previous mentioned letter, was received by Kern County Land Company. Copies of those letters are annexed hereto as Exhibit F. In those letters Occidental stated, as it had previously announced publicly, that it would not oppose the Kern-Tenneco Plan. The Occidental statements, as corrected, read in part as follows:

> "At the time of the announcement of the proposed KCL-Tenneco transaction, we were greatly disappointed that we had been unable to arrive at some common ground with KCL looking to a joining of KCL with Occidental. Accordingly, because of this and because of our substantial investment in KCL, our first reaction was to attempt to find out if our investment was in jeopardy and further to see whether a better proposal could be obtained by KCL for the benefit of its shareholders. On the basis of

our examination of material concerning KCL available to the public, we concluded that Occidental could not offer KCL a more attractive proposal than that made by Tenneco. . . .

"In view of the fact that we would rather have worked out our own transaction with KCL, we shall not vote our KCL shares at the KCL Shareholder's Meeting on July 17, 1967.

"This does not mean that we view the transaction as unfair or inequitable to a KCL Shareholder. Viewed solely in this light, we can say that if the form of the transaction were one in which we had a right of appraisal, we would not seek such right but would vote in favor of the sale of assets."

8. *The facts regarding the closing of the transaction are as follows:*

(a) After approval of the Agreement and Plan of Reorganization by Kern's shareholders, Kern and Tenneco undertook to satisfy all conditions precedent to consummation of the Plan, including securing a ruling from the Internal Revenue Service that the transaction would be tax-free and a permit from the California Commissioner of Corporations authorizing issuance of the Tenneco Preference Shares to be received by Kern pursuant to the Plan.

(b) Article 7.9 of the Agreement and Plan of Reorganization authorized a Closing Date "not earlier than September 30, 1967, and not later than December 31, 1967, as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon." The Board and management of Kern were anxious that the transaction be consummated as soon as possible after satisfaction of all conditions precedent in order to secure for our shareholders the advantages of the Plan at the

earliest date and to minimize the possibility that interim developments might somehow defeat the Plan or require its modification to the detriment of our shareholders. All conditions precedent to the closing of the transaction were first satisfied on August 30, 1967, and on that date the closing took place.

(c) Kern never entered into, acquiesced in, consented to or approved any agreement or understanding with Occidental or any other party to delay, postpone or defer the closing of the transactions contemplated by the Agreement and Plan of Reorganization.

(d) I have never known of any agreement or understanding, written or oral, between Tenneco Corporation or Tenneco Inc. or any of its or their representatives and Occidental or any of its representatives to the effect that the closing of the transactions contemplated by said Agreement and Plan of Reorganization would be delayed, postponed or deferred until December 9, 1967 or any other date.

9. No officer, director, employee, attorney or other authorized representative of Kern participated in or attended any discussions, meetings or negotiations between Tenneco Corporation and Occidental with respect to the "Option Agreement" made between them under date of June 2, 1967.

GEORGE G. MONTGOMERY

(Sworn to March 11, 1968.)

Exhibit A, Annexed to Foregoing Reply Affidavit

(MINUTES OF MEETING OF BOARD OF DIRECTORS OF KERN COUNTY LAND COMPANY, MAY 19, 1967 AND ATTACHMENTS THERETO)

San Francisco, California
May 19, 1967

An adjourned special meeting of the Board of Directors of KERN COUNTY LAND COMPANY, adjourned from the office of the corporation, 600 California Street, this City, on the above date at 12:01 o'clock P.M. convened at 12:15 o'clock P.M. this date in the Emerald Room at the Mark Hopkins Hotel, this City. Chairman of the Board Geo. G. Montgomery presided. Howard G. Hawkins, Jr., Secretary of the corporation, served as Secretary.

PRESENT: Charles A. Anderson, Ernest C. Arbuckle, Dwight M. Cochran, Fred A. Davies, Burnham Enersen, Louis Lee Haggin II, Geo. G. Montgomery, John M. Preston, Herbert L. Reid and Porter Sesnon.

ABSENT: Peter Cook, Jr., William R. Hewlett and Thomas M. McDaniel, Jr.

ALSO PRESENT: John J. Hartmann, Vice President—Finance.

OFFERS OF COMBINATION

Mr. Montgomery stated that the following alternative courses were open to the Company:

1. Continue to operate as a publicly-owned corporation.

2. Dissolve and liquidate.

3. Accept an offer of corporate combination received from Occidental Petroleum Corporation.

Exhibit A, Annexed to Foregoing Reply Affidavit

4. Accept an offer of corporate combination received from Tenneco Inc.

He stated that, as reported previously to the Board, discussions and negotiations had been conducted by the management with several companies in addition to Occidental and Tenneco but that only these two had made definitive offers.

Mr. Cochran pointed out that the Board's action must be guided by the duty of the Directors to make its decision in the best interests of all the stockholders. Mr. Enersen added that any action taken should be based upon full information and the best advice and judgment available to the Directors. The Chairman stated that we would devote whatever time might be required to fully evaluate the situation and to enable each Director to obtain all the information he might desire in order to arrive at a decision.

The Directors were reminded that personnel of Morgan Stanley & Co., investment bankers, had been at work for the Company since soon after the Occidental offer for the tender of Company stock at $83.50 per share had been published on May 8, 1967, and that their work included analysis and evaluation not only of that tender offer but also of the subsequent Occidental and Tenneco offers made to the Company.

Mr. Montgomery stated that the Occidental combination offer had been made orally to Mr. Cochran and him, with John H. T. Wilson of Morgan Stanley & Co. present, on Wednesday, May 17, 1967 by Walter R. Davis, Executive Vice President for Operations of Occidental Petroleum Corporation, and Warren Hellman, general partner of Lehman Brothers, Occidental's investment bankers. Mr. Montgomery reported that the Occidental representatives stated that Occidental's offer was subject to approval by the Board of Directors of Occidental, that it would expire at 5:00 P.M. Pacific Daylight Time on Friday, May 19,

1967, that the terms of the offer were not open to negotiations except as to certain items of the preferred stock redemption terms, and that this was Occidental's "best offer". The Tenneco offer was made in writing with the statement that it had been approved by the Executive Committee of the Board of Directors of Tenneco and by each individual member of that Board except one traveling in Europe who could not be reached.

(At this point Messrs. John F. Ahearn, Director of Corporate Planning of J. I. Case Company, Gregory H. Turnbull, Corporate Planner of the Company and William C. Bodman, Corporate Planner of the Company, joined the meeting.)

Mr. Hartmann reviewed for the Directors an extensive analysis and evaluation of the alternatives listed above, observing that information from published reports on Occidental and Tenneco and other data had been used and that the assistance of personnel of Morgan Stanley and Co. and Haskins & Sells, the Company's public accountants, as well as Company employees had been utilized in preparing the report. He described the Occidental and Tenneco offers in the following respects:

Occidental Offer (as amended):

> One share of new convertible preferred stock for one share of Company stock, such preferred share to carry an annual dividend rate of $3.50, a liquidating value of $100.00 and be convertible at any time while outstanding into 1.4 shares of Occidental common stock (such 1.4 shares having a current market value of approximately $84.00 per share). It was indicated by Davis and Hellman that the preferred stock would be callable after 2 years at $103.50 per share.
>
> It was stated that the Occidental offer as made on Wednesday, May 17, had included a conversion ratio of 1.25 shares of common for one share of the

preferred, but that at 11:30 A.M. on this day, Friday, May 19, Occidental had by telephone amended its offer by increasing that ratio to 1.4.

Tenneco Offer:

One share of new convertible preferred stock (junior to existing preferred) for one share of KCL stock, such preferred to carry an annual dividend rate of $5.50 per share, a liquidating value of $100.00 and be convertible on and after July 1, 1969 into 3.6 shares of Tenneco common stock (such 3.6 shares having a current market value of approximately $86.40). The preferred stock would be callable ten years after issue at $110.00 per share, reducing $1.00 per year until the call price reached $100.00 per share. (A copy of the letter containing this offer from Tenneco Inc. is attached to these minutes.)

(At this point Mr. John H. T. Wilson of Morgan Stanley & Co. joined the meeting.)

Mr. Hartmann then commented on estimates of the liquidation value of the Company's assets, the taxes applicable to liquidation procedures and the practical problems involved in accomplishing liquidation at a fair value of assets within the time permitted to accomplish a tax free result.

The report also dealt with the history, objectives, major operations, financial results, acquisition purposes and other detailed information on Occidental and Tenneco. He then reviewed information relating to a combination of Occidental and the Company and a combination of Tenneco and the Company. Mr. Hartmann concluded his presentation by relating in detail the terms of the Occidental and Tenneco offers and the impact each would have on Company stockholders.

Exhibit A, Annexed to Foregoing Reply Affidavit

A general discussion among the Directors followed.

(At this point all non-directors excepting the Secretary left the meeting.)

Two advisory letters from Morgan Stanley & Co. expressing opinion decidedly more favorable to the Tenneco offer than the Occidental offer were read to the Directors. (Copies of said letters from Morgan Stanley & Co. are attached to these minutes.) Also, the written corporate combination offer received from Tenneco was read to the Directors. The four alternatives were discussed and considered in detail by the Directors.

Mr. Arbuckle thereupon moved, and Mr. Haggin seconded, and the Board unanimously adopted, the following resolution:

> WHEREAS, Occidental Petroleum Corporation, a California corporation, on May 17, 1967 made to this corporation an offer of corporate combination and on May 19, 1967 amended that offer; and
>
> WHEREAS, Tenneco Inc., a Delaware corporation, on May 18, 1967 made an offer of corporate combination to this corporation; and
>
> WHEREAS, both said offers have been studied, discussed and considered by the Board of Directors of Kern County Land Company;
>
> NOW, THEREORE, BE IT RESOLVED, by the Board of Directors of Kern County Land Company, that in its judgment the aforementioned offer of Tenneco Inc. is a good, fair and reasonable offer and substantially better than the aforementioned Occidental offer, as amended; and
>
> FURTHER RESOLVED, that the aforementioned Occidental offer, as amended, is hereby rejected; and

Exhibit A, Annexed to Foregoing Reply Affidavit

FURTHER RESOLVED, that acceptance of said Tenneco offer is in the best interests of this corporation and its shareholders and is hereby accepted subject to approval of the shareholders of the Company; and

FURTHER RESOLVED, that a meeting of the shareholders of this corporation of record on June 1, 1967 is hereby called for July 17, 1967, for the purpose of acting upon the aforementioned Tenneco offer of corporate combination.

Thereupon, there being no further business, the meeting was adjourned at 4:45 P.M.

H. G. HAWKINS, JR.
Secretary

Exhibit A, Annexed to Foregoing Reply Affidavit

TENNECO INC.
TENNESSEE BUILDING
HOUSTON, TEXAS

May 18, 1967

Kern County Land Company
600 California Street
San Francisco, California 94108

Attention: Mr. George G. Montgomery

Gentlemen:

After careful but hasty review of the assets and properties of Kern County Land Company (Kern), Tenneco Inc. (Tenneco) desires to submit for your consideration the following offer:

Tenneco proposes to enter into an Agreement and Plan of Reorganization, pursuant to which Tenneco will offer to Kern for each share of Kern's stock now outstanding one share of a new $5.50 preference cumulative convertible stock (secondary to 4,395,400 shares of Tenneco preferred stock now authorized, of which 3,324,024 are outstanding) in exchange for all of the assets, property and goodwill of Kern (subject to its liabilities). Each share of the $5.50 preference stock will be convertible into 3.6 shares of Tenneco common stock. The preference stock will not be callable by Tenneco for a period of ten years and thereafter will be callable at $110, decreasing $1 each year thereafter to $100. The conversion right into the common stock of Tenneco will not be exercisable until July 1, 1969. Such preference stock will be entitled to one vote per share and will be entitled as a class to approve the authorization of any additional preferred stock ranking equal with or prior to it (except for the 4,395,400 shares of preferred

stock now authorized). In this connection we call to your attention the fact that 2,000,000 shares of the now authorized Tenneco preferred stock are reissuable if converted or retired.

Upon liquidation of Tenneco, whether voluntary or involuntary, the new class of preference stock will have a liquidating value of $100, plus accrued dividends.

The foregoing offer is conditioned upon

1. The necessary stockholder approval of stockholders of Kern and Tenneco;

2. The receipt of a favorable tax ruling satisfactory to both Kern and Tenneco as to the tax-free nature of the reorganization;

3. The approval, if in the opinion of Tenneco approval is necessary, of the SEC of the transaction on a "pooling of interest" basis;

4. The registration and listing on the New York and Pacific Coast Stock Exchanges of the Tenneco security hereby offered;

5. The issuance of negotiating and issuance permits from the Commissioner of Corporations of California;

6. Approval of all documentation to the satisfaction of counsel for both parties;

7. The absence of any restraining order, whether sought by governmental authority or any individual, on the closing date and the satisfaction of the managements of Tenneco and Kern at the closing date that any stockholder action which may then be pending will not materially adversely affect the value of Kern's assets and the consummation of the transactions contemplated by the Plan of Reorganization;

Exhibit A, Annexed to Foregoing Reply Affidavit

8. The closing of the transaction herein contemplated no later than September 30, 1967, unless extended by mutual agreement of Tenneco and Kern.

This proposal has been reviewed with all of the members of the Board of Directors of Tenneco with the exception of one who is abroad and has the unanimous approval of the Executive Committee of the Board of Directors of Tenneco.

We request you to call a meeting of your Board of Directors at the earliest practicable date to consider this proposal and that immediately thereafter you notify us as to whether the same is rejected or accepted. In the event the same is rejected, we ask that this letter be returned to us without disclosure of the terms hereof except to directors, advisors and management personnel. In the event the proposal is acceptable, we ask that you immediately notify us before making public disclosure of the pertinent terms of this proposal.

In the event of acceptance, we will cooperate with you to the end of drafting an Agreement and Plan of Reorganization at the earliest possible date.

Cordially,

Wilton E. Scott
Senior Vice President
Tenneco Inc.

Exhibit A, Annexed to Foregoing Reply Affidavit

May 19, 1967

To the Board of Directors of
Kern County Land Company:

We have, of course, had only a limited time in which to analyze the offers we understand Kern County Land has received from Occidental Petroleum Corporation and Tenneco, Inc. However, as a result of the study we have been able to make, which has been from a financial standpoint on the basis of published figures only, we are of the opinion that the offer by Occidental of a $3.50 preferred stock convertible into 1¼ shares of Occidental common stock would have a value under current market conditions, giving effect to the combination of the two companies, in the area of $85 to $87.50 per KCL share. On the same basis, we are of the opinion that the offer by Tenneco of a $5.50 preference stock convertible after two years into a 3.6 shares of Tennect common stock would have a value in the area of $97 to $99. In our opinion, based on our familiarity with KCL and on our study of the Tenneco offer, such offer should be attractive to the stockholders of Kern County Land.

Morgan Stanley & Co.

May 19, 1967

To the Board of Directors of
Kern County Land Company:

We understand that Kern County Land Company has received a revised offer from Occidental Petroleum Corporation consisting of a $3.50 preferred stock convertible into 1.4 shares of Occidental Petroleum common stock for each share of Kern County Land common stock. On the same basis as in our previous memorandum relating to offers by Occidental and Tenneco, Inc. we are of the opinion that the revised offer by Occidental described above would

have a value under current market conditions, giving effect to the combination of the two companies, in the area of $90 to $92 per Kern County Land share.

MORGAN STANLEY & Co.

WAIVER OF NOTICE AND CONSENT
TO MEETING OF THE BOARD OF DIRECTORS
OF
KERN COUNTY LAND COMPANY

May 19, 1967

We, the undersigned, being all the Directors of Kern County Land Company, a California corporation, do hereby consent to the holding of a meeting of the Board of Directors of said corporation at the Emerald Room, Mark Hopkins Hotel, San Francisco, California, on Friday, the 19th day of May, 1967, at 12:15 o'clock p.m., and we do hereby waive notice of said meeting.

Charles A. Anderson
CHARLES A. ANDERSON

E. C. Arbuckle
ERNEST C. ARBUCKLE

DWIGHT M. COCHRAN
Dwight M. Cochran

PETER COOK, JR.

Fred A. Davies
FRED A. DAVIES

Burnham Enersen
BURNHAM ENERSEN

Louis Lee Haggin II
LOUIS LEE HAGGIN II

William R. Hewlett
WILLIAM R. HEWLETT

Thomas M. McDaniel, Jr.
THOMAS M. MCDANIEL, JR.

Geo. G. Montgomery
GEO. G. MONTGOMERY

John M. Preston
JOHN M. PRESTON

Herbert L. Reid
HERBERT L. REID

Porter Sesnon
PORTER SESNON

Exhibit A, Annexed to Foregoing Reply Affidavit

WAIVER OF NOTICE AND CONSENT
TO MEETING OF THE BOARD OF DIRECTORS
OF
KERN COUNTY LAND COMPANY

May 19, 1967

We, the undersigned, being all the Directors of Kern County Land Company, a California corporation, do hereby consent to the holding of a meeting of the Board of Directors of said corporation at the Emerald Room, Mark Hopkins Hotel, San Francisco, California, on Friday, the 19th day of May, 1967, at 12:15 o'clock p.m., and we do hereby waive notice of said meeting.

CHARLES A. ANDERSON

ERNEST C. ARBUCKLE

DWIGHT M. COCHRAN

Peter Cook, Jr.

PETER COOK, JR.

FRED A. DAVIES

BURNHAM ENERSEN

LOUIS LEE HAGGIN II

WILLIAM R. HEWLETT

THOMAS M. MCDANIEL, JR.

GEO. G. MONTGOMERY

JOHN M. PRESTON

HERBERT L. REID

PORTER SESNON

Exhibit B, Annexed to Foregoing Reply Affidavit

(Letter, Dated May 18, 1967)

TENNECO INC.
Tennessee Building
Houston, Texas

May 18, 1967

Kern County Land Company
600 California Street
San Francisco, California 94108
Attention: Mr. George G. Montgomery

Gentlemen:

In connection with the proposal which we have this day made to you concerning the acquisition by Tenneco Inc. (Tenneco) of the assets, business and goodwill of Kern County Land Company (Kern), this letter is furnished to you for the purpose of expressing the intent of Tenneco with reference to the operation of the Kern properties and the management and employee policies to be followed by Tenneco after the closing.

It is the intention of Tenneco that the operation of Kern shall continue in substantially the same manner in which the business of Kern is presently being conducted, utilizing the name "Kern County Land Company" in its operation with the business of the company conducted as an operating entity, either as a subsidiary or a division, of Tenneco. It is further our intention to retain Kern's present management and personnel and to follow all of the employee benefit programs now extended to the employees of Kern. The benefit programs of Kern will be kept in existence for at least one year and thereafter Tenneco will extend to the employees of Kern the option of substituting the Tenneco benefit programs for Kern's or allowing the employees to continue the Kern programs as they now exist.

Exhibit B, Annexed to Foregoing Reply Affidavit

You have informed us of the existence of certain unexercised stock options in the hands of certain of your employees. In the Plan of Reorganization to be executed by Tenneco and Kern, we will include such provisions as are necessary for the acceleration of the rights of the option holders to exercise their stock options and will make such arrangements for their benefit in financing the purchase of option stock as may be within the framework of the option plans as they presently exist, or as they may be amended and as may be possibly under existing law. For such of those options which cannot so be exercised under acceleration amendments to the option plans, we agree to substitute an option for such option holders to acquire an equal number of shares of Tenneco $5.50 Preference Stock at the same price and on the same terms and conditions as such option holders now have under the Kern plans.

Cordially,

Wilton E. Scott
Senior Vice President
Tenneco Inc.

Exhibit C, Annexed to Foregoing Reply Affidavit

(Papers Relating to Occidental's Statutory Demand for Inspection of Corporate Records)

Occidental Petroleum Corporation
10889 Wilshire Boulevard, Suite 1500
Los Angeles, California 90024
879-1700 – 477-8521

May 22, 1967.

Mr. Dwight M. Cochran, President,
or
Mr. Howard G. Hawkins, Secretary,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

Dear Sirs:

The undersigned, a shareholder of Kern County Land Company, hereby makes demand, pursuant to section 3003 of the California Corporations Code, to inspect the share register or duplicate share register, the books of account and the minutes of proceedings of the shareholders, the board of directors and the executive committee of such company, together with all records, books and documents referred to therein or made a part thereof and to make extracts of all thereof for a purpose reasonably related to the interests of the undersigned as a shareholder, to wit, to protect its interest as a shareholder, commencing at 10 o'clock A.M. on May 23, 1967. The undersigned hereby designates Richard J. MacLaury, Bruce A. Mann, Harvey Hinman, Margaret G. Gill, Edward R. Hare, Kennan W. Walker, Robert W. Sandison and Sterling R. Price, Jr., as its agents to make such inspection; provided, however, that

no more than four of said agents shall make such inspection at any one time.

Very truly yours,

OCCIDENTAL PETROLEUM CORPORATION

By W. R. Davis
W. R. DAVIS, Executive
Vice President

LAW OFFICES OF
PILLSBURY, MADISON & SUTRO
Standard Oil Building
225 Bush Street
San Francisco, California 94104

Telephone 421-6133
Area Code 415

May 23, 1967.

Mr. Howard G. Hawkins, Jr., Secretary,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

Dear Sir:

In accordance with the letter of Mr. W. R. Davis dated May 22, 1967, addressed to you and Mr. Dwight M. Cochran, and Mr. Cochran's reply thereto dated May 22nd, representatives of Occidental Petroleum Corporation visited the offices of Kern County Land Company this morning for the purpose of inspecting the share register, books of account and minutes of Kern County Land Company. Your

attorneys, Burnam Enersen, Esq., and Stephen Grant, Esq., requested the representatives of Occidental Petroleum Corporation to furnish you with a statement of the reasons for its request to make the inspection referred to in the letter of Mr. Davis, dated May 22nd.

The reasons, among others, for the request of Occidental Petroleum Corporation dated May 22, 1967, is to determine whether the affairs of Kern County Land Company have been conducted in the best interests of the Corporation and its shareholders, to determine whether it is in the best interests of Occidental Petroleum Corporation to retain or dispose of its shares in Kern County Land Company and to enable Occidental Petrolum Corporation to consult and advise with other shareholders.

Representatives of Occidental Petroleum Corporation will visit your office tomorrow morning at 10 A.M. for the purpose of inspecting and making extracts from materials referred to in the letter of Mr. Davis dated May 22nd.

Occidental Petroleum Corporation withdraws the designation of Edward R. Hare, Kennan W. Walker, Robert W. Sandison and Sterling R. Price, Jr., as its agents to make such inspection and, in lieu thereof, names Shirley L. Lucas, Maurice P. Lebowitz, Douglas F. Page and Robert Donzelli as agents for such inspection.

Tomorrow morning we will present you with a specific designation of the books of account which the representatives of Occidental Petroleum Corporation would like to examine.

PILLSBURY, MADISON & SUTRO

By Richard MacLaury
RICHARD J. MACLAURY
Attorneys for Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK
120 Montgomery Street
San Francisco

May 29, 1967
DELIVER

Kern County Land Company,
600 California Street,
San Francisco, California 94108

Attention: George C. Montgomery,
Chairman of the Board,
Dwight M. Cochran, President.

Gentlemen:

On behalf of Occidental Petroleum Corporation ("Occidental"), as the principal stockholder of Kern County Land Company ("KCL"), we hereby request from you the following documents, action, and information:

1. The election of at least two (2) persons to be designated by Occidental to the board of directors of KCL.

2. Copies of the reports, documents, etc. described in the list attached hereto as Exhibit A.

3. The date on or about which KCL intends to mail proxy material to its stockholders in connection with the proposed transaction with Tenneco.

4. Whether KCL and Tenneco, or either of them, proposes to file an application with the Department of Investment, Division of Corporations of the State of California relating to the proposed Tenneco transaction, and if so, the date on or about which this will be done.

5. Whether KCL proposes to seek a ruling from the Internal Revenue Service as to the tax effect under the Internal Revenue Code of the proposed

transaction with Tenneco upon KCL and its stockholders.

6. All information relating to offers or proposals from other than Tenneco and Occidental to purchase assets or shares of KCL or to merge with KCL.

7. Pursuant to California Corporations Code, section 3005, the right to inspect all records of, and to investigate, all property of KCL.

If you have any question as to the foregoing information being kept in confidence, we will agree that it be given only to members or associates of our firm, members or associates of Arthur Young & Company, certified public accountants, a mutually acceptable firm of petroleum engineers, and a mutually acceptable firm of real estate appraisers under agreements not to disclose such information to others except with the agreement of KCL or under order of a court or agency of competent jurisdiction. The cost of collection and reproduction of the information requested will be borne by Occidental.

While we obviously do not expect you to comply with all this request immediately, we do request by 5:00 p.m. today your answers to questions 3 and 4 above, and as to what action will be taken by KCL, and what information will be furnished by KCL, as to the other matters requested, and when such will occur.

Very truly yours,

MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK

By Richard J. Archer
RICHARD J. ARCHER

RJA:pd
Enc.
cc: Burnham Enersen

Exhibit C, Annexed to Foregoing Reply Affidavit

EXHIBIT A

Copies of all reports and studies prepared within the past five (5) years by KCL, or by any third party, and presently in the possession of KCL (including, without limitation, any such report or study prepared by White, Weld & Co., or Morgan, Stanley & Co.) relating to any of the following:

(a) Tenneco, Inc., or the proposed transaction between KCL and Tenneco, Inc., relating to the issuance of Tenneco stock to KCL or its stockholders.

(b) The value of any or all of the assets or business of KCL, or any part thereof.

(c) The value of the Common Stock of KCL.

2. Comprehensive report on oil and gas exploration by E. P. Burtchaell, Manager, Oil Production, R. E. Brodek, Manager, Oil Exploration, and James A. Walker, Manager, Oil Lands and Leases, presented to the April 6, 1967 meeting of the board of directors of KCL (Vol. 22 of Minute Book, page 158).

3. Report of Progress of the Company in relationship to its long range forecast, presented to the November 3, 1966 meeting of the board of directors of KCL (Vol. 22 of Minute Book, page 97).

4. Report of Long Range Plans and Objectives of KCL, as presented to the October 3, 1963 meeting of the board of directors of KCL (Vol. 21 of Minute Book, pages 13-18).

5. Reports of the Advisory Planning Committee to the board of directors of KCL for the past five (5) years.

6. Copies of property descriptions of real properties of KCL (including geographical location as to country, state

or province and county and legal descriptions) divided into the following categories:

(a) Properties owned by KCL and operated by KCL or others for agricultural purposes.

(b) Properties owned by KCL from which oil or gas is being extracted, or from which KCL has reason to believe oil or gas may hereafter be extracted.

(c) Properties leased by KCL from others, or in which KCL has some other interest, from which oil or gas is being extracted, or from which KCL has reason to believe oil or gas may hereafter be extracted.

(d) Properties owned by KCL from which other minerals are being extracted, or from which KCL has reason to believe other minerals may hereafter be extracted.

(e) Properties leased by KCL from others, or in which KCL has some other interest, from which minerals are being extracted, or from which KCL has reason to believe minerals may hereafter be extracted.

(f) Properties owned by KCL and operated by KCL or others in its Cattle Division.

(g) Properties owned by KCL and operated by KCL or others in its Water Division.

(h) KCL's Stockdale property.

(i) KCL's Santa Monica Shores property.

(j) Other real properties owned and leased by KCL.

7. Copies of reports delivered at each meeting of the board of directors during the last five (5) years with re-

spect to oil and gas operations, the hard mineral program, lessee oil and gas operations and real estate to the extent not described above.

LAW OFFICES OF
MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK
120 Montgomery Street
San Francisco 94104
Telephone
Area Code 415
421-5670
Cable "Moreld"

May 29, 1967

Burnham Enersen, Esq.,
Messrs. McCutcheon, Doyle, Brown,
Trautman & Enersen,
601 California Street,
San Francisco, California 94108

Re: *Kern County Land Company*

Dear Mr. Enersen:

We hereby request on behalf of Occidental Petroleum Company that Kern County Land Company ("KCL") supply to Douglas Page, of Arthur Young & Co., the following documents:

1. 1966 Consolidating Financial Statements for the "Kern Group" referred to in the 1966 Consolidating Balance Sheet and Income Statement for the Kern Group with outside subsidiaries heretofore furnished to Mr. Page.

Exhibit C, Annexed to Foregoing Reply Affidavit

2. Text of consolidating journal entries at October 31, 1966.

3. Details of cash receipts from oil operations of KCL for October, 1966.

4. 1966 Federal Income Tax Return for KCL, with supporting Form "O".

5. Correspondence for the past five years between the Internal Revenue Service and KCL, and any of its subsidiaries.

6. Aircraft log books for the last two years for the three aircraft (Nos. N-102, N-103 and N-104) operated by KCL.

The documents mentioned in 1 through 5, inclusive, above are being requested to permit Arthur Young & Co. properly to analyze and interpret the published consolidated financial statements of KCL and subsidiaries for the fiscal year ended October 31, 1966.

The documents requested in 6 above are requested to permit us to account for the travels of principal executive officers of KCL in connection with any negotiations looking to a merger by KCL, or sale of its assets.

Very truly yours,

(Signed) Richard J. Archer
RICHARD J. ARCHER

RJA:pd
cc: Mr. Douglas Page,
Arthur Young & Co.,
120 Montgomery Street
San Francisco, California 94104

Exhibit C, Annexed to Foregoing Reply Affidavit

At this point in the original exhibit, a Petition for Writ of Mandate in California Action No. 579283 was set forth. It is identical with Exhibit A, Annexed to Affidavit of Richard J. Archer, printed herein at pages 465a to 473a.

AFFIDAVIT OF CHARLES J. LEE IN SUPPORT OF PETITION OF OCCIDENTAL PETROLEUM CORPORATION FOR WRIT OF MANDATE

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
OCCIDENTAL PETROLEUM CORPORATION

Exhibit C, Annexed to Foregoing Reply Affidavit

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

Civil No. 579283

—o—

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY AND HOWARD G. HAWKINS, Secretary of Kern County Land Company,
Respondents.

—o—

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss.:

CHARLES J. LEE, being first duly sworn, deposes and says:

1. I am a duly appointed officer of Occidental Petroleum Corporation, a California corporation (hereinafter referred to as "Occidental"), to wit, the Controller and an Assistant Secretary of Occidental, and am duly authorized to execute this affidavit on behalf of said corporation.

2. Occidental is the registered holder of more than 500,000 shares of capital stock of Kern County Land Company, a California corporation (hereinafter referred to as "Kern"). I am advised, and believe, that Occidental is the largest single beneficial owner of shares of Kern capital stock.

Exhibit C, Annexed to Foregoing Reply Affidavit

3. I am informed, and believe, that at a special meeting of the board of directors of Kern on May 19, 1967, said board of directors took action to approve the sale of the assets of Kern to, or the merger of Kern with, Tenneco Inc., a Delaware corporation (hereinafter referred to as "Tenneco"), and to call a special meeting of the shareholders of Kern to act upon said sale or merger.

4. Occidental must determine the form, terms and conditions of said proposed transaction, the matters considered by the board of directors of Kern in deciding to accept the offer of Tenneco and the nature of any other offers considered by said board of directors. Occidental desires to ascertain the identity and location of the other shareholders of Kern in order to consult and advise with them concerning said proposed transaction and to determine whether it is desirable to solicit proxies in opposition thereto.

5. Because of the substantial time necessary to adequately evaluate the proposed transaction, to determine whether shareholders of Kern will support or oppose said transaction, and to prepare for the distribution of any proxy soliciting material which would be necessary if Occidental elects to oppose said transaction, it is essential that Occidental forthwith be permitted to examine and make extracts of the minutes of all meetings of the board of directors or executive committee of Kern held during the month of May, 1967, including copies of all proposals for the merger or sale of assets of Kern considered thereat, or, with respect to any such meeting the minutes of which have not been prepared, all notes, memoranda and other writings prepared by the Secretary or other employee or agent of Kern which describe or show the transactions conducted at such meetings and all offers, memoranda of offers and other documents acted upon at such meetings, and the share register or duplicate share register of Kern.

Exhibit C, Annexed to Foregoing Reply Affidavit

6. It is most urgent that Occidental have immediate access to above-mentioned minutes, notes, memoranda, writings, documents, and share register. If Occidental is precluded from examining said items until management of Kern has completed preparation of its proxy soliciting material in favor of said proposed transaction, has printed and mailed such material to its shareholders and has commenced to solicit proxies for said special meeting, Occidental will be effectively prevented from making an informed determination of the position it should take as a shareholder of Kern or from preparing and distributing to the other shareholders of Kern proxy material opposing the recommendations of management with respect to said proposed transaction.

7. Occidental must have access to the foregoing items in sufficient time to permit it to evaluate the proposed transaction, to determine whether it is in its best interest as a shareholder of Kern to oppose said proposed transaction, to prepare proxy soliciting material for distribution to the other shareholders of Kern, to file preliminary copies of said proxy soliciting material with the Securities and Exchange Commission at least ten days prior to the date on which it is proposed that such material shall be mailed to shareholders, and to mail such material in sufficient time for other shareholders of Kern to compare it with the proxy soliciting material distributed by the management of Kern and determine for themselves whether to support or oppose the proposal made by management. If Occidental is delayed in obtaining the aforementioned items, the shareholders of Kern will not have an adequate

opportunity to appraise possible alternative proposals before the assets of Kern are disposed of by sale or merger.

Charles J. Lee
CHARLES J. LEE, Controller and Assistant Secretary of Occidental Petroleum Corporation.

(Sworn to May 24, 1967.)

George Guisti
GEORGE GUISTI
Notary Public
State of California

Exhibit C, Annexed to Foregoing Reply Affidavit

(MOTION FOR LEAVE TO SERVE NOTICES OF TAKING DEPOSITIONS AND FOR AN ORDER SHORTENING TIME OF TAKING DEPOSITIONS)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY and HOWARD G. HAWKINS,
Secretary of Kern County Land Company,
Respondents.

Petitioner moves the Court for an order granting petitioner leave to serve notices of taking depositions of the following persons by oral examination prior to the expira-

tion of twenty (20) days after service of the writ of mandate on respondents, or any of them:

(1) Mr. Dwight M. Cochran, President,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

(2) Mr. Howard G. Hawkins, Jr., Secretary,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

Petitioner further moves the Court for an order granting the time of taking said depositions to days after service of notices thereof.

This motion is made upon each of the following grounds as more particularly shown by the petition for writ of mandate, affidavit, memorandum of points and authorities in support of this and petitioner's writ of mandate, and all records and files herein:

1. Respondent Howard G. Hawkins is the Secretary of Kern County Land Company. He is believed to have information concerning the existence and location of notes, memoranda and other writings prepared by him or one or more employees or agents of respondent Kern County Land Company, which describe or show the transactions conducted at meetings of the board of directors and the executive committee of said board of directors of respondent Kern County Land Company;

2. It is believed that he is also custodian of the books of account, share register, or duplicate share register, and minutes of meetings of the board of directors and executice committee of the board of directors of respondent Kern County Land Company;

Exhibit C, Annexed to Foregoing Reply Affidavit

3. It is further believed that respondent Howard G. Hawkins has knowledge of the reasons why Kern County Land Company has refused and continues to refuse to permit petitioner, Occidental Petroleum Corporation, to inspect and make extracts of the records and papers of Kern County Land Company pursuant to section 3003 of the California Corporations Code;

4. It is further believed that respondent Howard G. Hawkins has knowledge whether the board of directors or executive committee of the board of directors of Kern County Land Company on May 19, 1967, accepted or otherwise acted upon an offer by Tenneco Inc., a Delaware corporation;

5. It is further believed that respondent Howard G. Hawkins is familiar with and can identify documents which are relevant and material to the proceedings herein;

6. Respondent Dwight M. Cochran is the President of Kern County Land Company. He is believed to have knowledge of the reasons why Kern County Land Company has refused and continues to refuse to permit petitioner, Occidental Petroleum Corporation, to inspect and make extracts of the records and papers of Kern County Land Company pursuant to section 3003 of the California Corporations Code;

7. It is further believed that respondent Dwight M. Cochran has knowledge whether the board of directors or executive committee of the board of directors of Kern County Land Company on May 19, 1967, accepted or otherwise acted upon an offer by Tenneco Inc., a Delaware corporation;

8. It is further believed that respondent Dwight M. Cochran, as the chief executive officer of Kern County Land Company, has knowledge of which officer or officers, director

Exhibit C, Annexed to Foregoing Reply Affidavit

or directors or committee of Kern County Land Company, for reasons unknown to petitioner, advised respondent Howard G. Hawkins to refuse to permit petitioner to inspect or make extracts of records and papers of respondent Kern County Land Company pursuant to section 3003 of the California Corporations Code.

Dated: May 25, 1967.

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

By RICHARD J. ARCHER
Attorneys for Petitioner,
Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

(MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND IN SUPPORT OF MOTION FOR LEAVE TO SERVE NOTICE OF TAKING DEPOSITIONS AND FOR AN ORDER SHORTENING TIME OF TAKING DEPOSITIONS)

Richard J. Archer
Robert D. Raven
Morrison, Foerster, Holloway,
Clinton & Clark
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

Occidental Petroleum Corporation, a corporation,
Petitioner,

vs.

Kern County Land Company and Howard G. Hawkins,
Secretary of Kern County Land Company,
Respondents.

I. Petitioner is Entitled to Inspection.

Corporations Code section 3003 provides, in part:

> "The share register or duplicate share register, the books of account, and minutes of proceedings of

> the shareholders and the board of directors and of executive committees of the directors of every domestic corporation * * * keeping any such records in this State shall be open to inspection upon the written demand of any shareholder * * * at any reasonable time, for a purpose reasonably related to his interests as a shareholder * * *.
>
> "Such inspection by a shareholder * * * may be made in person or by agent or attorney, and the right of inspection includes the right to make extracts. * * *
>
> "Demand of inspection * * * shall be made in writing upon the president, secretary, assistant secretary, or general manager of the corporation."

In California, shareholders have long had an unqualified right to inspect the shareholder registers, books and minutes where their purpose, as here, is reasonably related to the shareholders' interests (*Laher, etc. Corp.* v. *Superior Court* (1942) 52 Cal. App. 2d 467, 468; *Gilmore* v. *Emsco Derrick & Equip. Co.* (1937) 22 Cal. App. 2d 64, 67; *Gertridge* v. *State Capital Co.* (1933) 129 Cal. App. 86, 87; *Johnson* v. *Langdon* (1902) 135 Cal. 624, 625-628; *Webster* v. *Bartlett Estate Co.* (1917) 35 Cal. App. 283, 285; *Poor* v. *Yarnell* (1915) 28 Cal. App. 714, 715-716; c.f. *Mooney* v. *Bartenders Union Local No. 284* (1957) 48 Cal. 2d 841, 843; *Hobbs* v. *Tom Reed Gold Min. Co.* (1913) 164 Cal. 497, 499-502).

In *Webster* v. *Bartlett Estate Co.* (1917) 35 Cal. App. 283, when the corporation contended the plaintiff shareholder had asserted her right to inspect the corporate records in bad faith and to harass the corporation, the court held:

> " * * * it may not successfully be denied, that a stockholder of a corporation has the right to inspect the

> books of the corporation. This is a common-law right which also is recognized by statute in this state and which may be enforced by writ of mandate" (35 Cal. App. 285).

And in *Gilmore* v. *Emsco Derrick & Equip. Co.* (1937) 22 Cal. App. 2d 64, 67, the court reversed the lower court's denial of inspection by a shareholder and held:

> "By section 355 of the Civil Code a shareholder of a corporation is given the right to examine the share register of the corporation upon written demand 'for a purpose reasonably related to his interests as a shareholder'. The inspection includes the right to make extracts. It is manifest that plaintiff must be accorded the right to inspect the list of shareholders and make extracts therefrom unless it be shown that her demand was not for any purpose reasonably related to her interest as a shareholder."

II. Writ of Mandate is the Proper Remedy in This Case

Corporations Code section 3005 provides, in part:

> "Upon refusal of a lawful demand for inspection, or upon petition of the holders of ten percent (10%) of the issued and outstanding shares, the superior court of the county in which the principal office or in which the records are located may enforce the right of inspection with just and proper conditions . . . ."

It has been repeatedly held that mandamus is the proper proceeding by which the court enforces the shareholder's right of inspection (*Johnson* v. *Langdon* (1902) 135 Cal. 624, 625; *Webster* v. *Bartlett Estate Co.* (1917) 35 Cal. App. 283, 285; c.f. *Private Investors* v. *Homestake Min. Co.* (1936) 11 Cal. App. 2d 488, 496).

Exhibit C, Annexed to Foregoing Reply Affidavit

Moreover, when an application for a writ of mandate is made, "The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided" (Code Civ. Proc. sec. 1107).

In this proceeding, it is submitted that petitioner has shown good cause for the issuance of an alternative writ, and for the prompt hearing of its application for a peremptory writ should respondents fail to permit inspection (Aff. of Charles J. Lee).

Accordingly, petitioner here is entitled to an alternative writ of mandate compelling respondents to permit it to inspect and make extracts from the appropriate records of the respondent corporation or show cause before this Court why they have not done so.

III. Petitioner Should be Permitted to Take the Depositions of Respondents and Others Immediately

Petitioner's right to take respondents' depositions immediately should be granted upon a factual showing of "good cause."

Section 2016(a) of the California Code of Civil Procedure authorizes the Court, for good cause, to grant petitioner, prior to the expiration of twenty days after service of writ of mandate, leave to serve notice of taking depositions. Section 2019(a)(1) of the California Code of Civil Procedure authorizes the Court, on motion and for good cause shown, to shorten the normal notice period for the taking of depositions. Petitioner has filed its motion for leave to serve, prior to the expiration of twenty days, notices of taking depositions and for an order shortening the time of taking depositions. Petitioner seeks to com-

mence taking depositions within one day after service of writ of mandate.

In the recent case of *Waters* v. *Superior Court* (1962) 58 Cal. 2d 885, 27 Cal. Rptr. 153, the court defined "good cause" as used in section 2019 of the Code of Civil Procedure as follows (p. 893):

> "The concept of good cause should not be enshrined in legal formalism; it calls for a factual exposition of a reasonable ground for the sought order. The good cause may be equated to a good reason for a party's failure to perform that specific requirement from which he seeks to be excused."

Petitioner, by its verified petition for writ of mandate and the affidavit of Charles J. Lee, has shown urgent and good reasons why it should be permitted to take the depositions of respondents and others promptly:

1. Respondents Howard G. Hawkins and Dwight M. Cochran are persons known to petitioner who can identify the records relevant and material to this proceeding, inform petitioner whether the board of directors or executive committee of the board of directors of Kern County Land Company accepted or otherwise acted upon an offer by Tenneco Inc., a Delaware corporation, on May 19, 1967, inform and describe to petitioner any other offers or negotiations relating to a corporate reorganization of Kern County Land Company, and inform petitioner as to the reasons for respondents' refusal to permit petitioner to inspect and make extracts of the papers of Kern County Land Company pursuant to section 3003 of the California Corporations Code;

2. Each day lost in discovering the identity and contents of the records referred to above and in discovering the information in the possession of Messrs. Hawkins and Cochran increases the risk of loss of petitioner's property

rights as a shareholder in Kern County Land Company and impedes petitioner's ability to adequately evaluate the proposed transaction between Kern County Land Company and Tenneco Inc.;

3. Petitioner should have an immediate opportunity to learn the facts and the contents of the records known only to Messrs. Hawkins and Cochran relating to the matters referred to above.

CONCLUSION

For the reasons hereinabove set forth, we respectfully submit that the Court should grant petitioner each of the immediate remedies sought.

Dated: May 25, 1967.

Respectfully submitted,

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

By .....
RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

(ALTERNATIVE WRIT OF MANDATE)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY and HOWARD G. HAWKINS,
Secretary of Kern County Land Company,
Respondents.

TO KERN COUNTY LAND COMPANY, its agents, servants, attorneys and employees, to the Board of Directors of Kern County Land Company, and to HOWARD G. HAWKINS, Secretary of Kern County Land Company:

GOOD CAUSE APPEARING from the verified petition on file,

YOU ARE HEREBY COMMANDED forthwith to make available to and permit, agents of petitioner Occidental Petroleum

Exhibit C, Annexed to Foregoing Reply Affidavit

Corporation to inspect and make extracts of any and all share registers, duplicate share registers, and all notes, memoranda and other writings prepared by the Secretary or other employee, attorney or agent of Kern County Land Company which describe or show the transactions conducted at said meetings and all offers, memoranda of offers and other documents acted upon by the board of directors or executive committee of Kern County Land Company at any and all meetings held during May, 1967.

YOU ARE FURTHER COMMANDED to advise said persons in writing of the fact that you will forthwith permit the making of said extracts and inspection.

IN THE ALTERNATIVE, YOU ARE COMMANDED to appear in and before this Court at its courtroom in Department 11, on June 8th, 1967, at the hour of 9:30 A.M., then and there to show cause why you have not done so.

This order, together with copies of the verified petition of Occidental Petroleum Corporation and the memorandum of points and authorities in support thereof, shall be served on you not later than May 26, 1967.

Dated: May 25, 1967.

MARTIN MORGAN
Clerk of the Superior Court

By J. A. ORTELLE
Deputy Clerk

ORDER

Let the within writ issue.

ALVIN E. WEINBERGER
Judge of the Superior Court

Exhibit C, Annexed to Foregoing Reply Affidavit

(ORDER GRANTING PETITIONER LEAVE TO SERVE NOTICES OF TAKING DEPOSITIONS AND SHORTENING TIME OF TAKING DEPOSITIONS)

RICHARD J. ARCHER
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Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY and HOWARD G. HAWKINS,
Secretary of Kern County Land Company,
Respondents.

The motion of petitioner herein for the order hereinafter made was presented to and duly considered by the Court. Good cause appearing therefor:

Exhibit C, Annexed to Foregoing Reply Affidavit

IT IS ORDERED that petitioner is granted leave to serve forthwith a notice of taking depositions of the following persons:

(1) Mr. Dwight M. Cochran, President,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

(2) Mr. Howard G. Hawkins, Jr., Secretary,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

Said depositions shall be taken pursuant to the provisions of the Code of Civil Procedure of the State of California and notices described hereinafter.

It is further ORDERED that the time of taking said depositions is shortened to seven days after service of notices thereof.

Dated: May 25, 1967.

ALVIN E. WEINBERGER
Judge of the Superior Court

Exhibit C, Annexed to Foregoing Reply Affidavit

(NOTICE OF TAKING DEPOSITION OF DWIGHT M. COCHRAN)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY and HOWARD G. HAWKINS, Secretary of Kern County Land Company,
Respondents.

To respondents above named and to Messrs. McCutchen, Doyle, Brown & Enersen, their attorneys:

PLEASE TAKE NOTICE that on the 2d day of June, 1967, at 10:00 A.M. in the offices of Messrs. Morrison, Foerster, Holloway, Clinton & Clark, 11th Floor, 120 Montgomery Street, San Francisco, California 94104, petitioner Occi-

dental Petroleum Corporation will take the deposition of Dwight M. Cochran, President of Kern County Land Company, a corporation.

Dated: May 25, 1967.

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK

By Richard J. Archer
RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

(NOTICE OF TAKING DEPOSITION OF HOWARD G. HAWKINS)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,

Petitioner,

vs.

KERN COUNTY LAND COMPANY and HOWARD G. HAWKINS, Secretary of Kern County Land Company,

Respondents.

To respondents above named and to Messrs. McCutchen, Doyle, Brown & Enersen, their attorneys:

PLEASE TAKE NOTICE that on the 2d day of June, 1967, at 10:00 a.m. in the offices of Messrs. Morrison, Foerster,

Exhibit C, Annexed to Foregoing Reply Affidavit

Holloway, Clinton & Clark, 11th Floor, 120 Montgomery Street, San Francisco, California 94104, petitioner Occidental Petroleum Corporation will take the deposition of respondent Howard G. Hawkins.

Dated: May 25, 1967

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

By Richard J. Archer
RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

(VOLUNTARY DISMISSAL WITHOUT PREJUDICE)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, California 94104
Telephone 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,

Petitioner,

vs.

KERN COUNTY LAND COMPANY AND HOWARD G. HAWKINS, Secretary of Kern County Land Company,

Respondents.

To the Clerk of the above-styled Court:

Petitioner Occidental Petroleum Corporation hereby requests the Clerk of the above-styled Court to dismiss the above-entitled action without prejudice forthwith.

Exhibit C, Annexed to Foregoing Reply Affidavit

Dated: June 19, 1967.

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK

By Richard J. Archer
RICHARD J. ARCHER
Attorney for Petitioner
Occidental Petroleum Corporation

OFFICE COPY
Filed—June 19, 1967
By—GE
Served—June 19, 1967
By—Mail
Ent'd. Reg. X—Folio O
Folder No.—5302
RXA—RDR

CERTIFICATE OF SERVICE BY MAIL

Richard J. Archer hereby certifies:

That his business address is 120 Montgomery Street, San Francisco, California 94104; that he is an active member of the State Bar of California and that he is not a party to the cause.

That on the date hereof he served a copy of

VOLUNTARY DISMISSAL WITHOUT PREJUDICE

on each of the following, by placing one copy of each of said documents in an envelope, addressed, respectively, as follows:

Burnham Enerson, Esq.
McCutchen, Doyle, Brown & Enersen
601 California Street
San Francisco, California 94108

Exhibit C, Annexed to Foregoing Reply Affidavit

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States Mail at San Francisco, California.

Dated: June 19, 1967.

Richard J. Archer
RICHARD J. ARCHER

At this point in the original exhibit, a Petition for Writ of Mandate Under Corporation Code Sec. 3005 in California Action No. 579464 was set forth. It is identical with Exhibit B, Annexed to Affidavit of Richard J. Archer, printed herein at pages 474a to 483a.

Exhibit C, Annexed to Foregoing Reply Affidavit

(MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE UNDER CORPORATIONS CODE SEC. 3005)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, California 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

Civil No. 579464

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY, GEORGE G. MONTGOMERY, and DWIGHT M. COCHRAN,
Respondents.

I

A STOCKHOLDER OF A CORPORATION HOLDING SUBSTANTIAL MINERAL PROPERTIES IS ENTITLED TO INSPECT THOSE PROPERTIES

The precise question of whether a stockholder had a right to inspect mining assets of a corporation was decided

in favor of the stockholder in *Hobbs* v. *Tom Reed Gold Min. Co.*, 64 Cal. 497 (1913). In that case the court stated (p. 501):

> "Has a stockholder of a mining corporation the right to visit and inspect the mines of the company? We think there can be no doubt that the right exists. It is settled that at common law a stockholder has the right to inspect the books of the corporation. (2 Cook on Corporations, sec. 511; 4 Thompson on Corporations, sec. 4406 et seq.) The reasoning on which this rule is founded is that a stockholder has an interest in the assets and business of the corporation and that such inspection may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interests therein. There is not a feature of this reasoning that does not apply with equal force to the claim of a right to examine the property of the corporation, especially where it is mining property, the condition and value of which is so easily concealed or misrepresented. The books would often afford no information of the nature of the ore bodies exposed or of the matter in which the work was carried on. . . ."

II

Under the Corporations Code a Stockholder has a Right to Inspect Property

Section 3005 of the Corporations Code provides as follows:

> "Upon refusal of a lawful demand for inspection, or upon petition of the holders of ten percent (10%) of the issued and outstanding shares, the superior

> court of the county in which the principal office or in which the records are located may enforce the right of inspection with just and proper conditions, or may appoint one or more competent inspectors or accountants to audit the books and records kept in the State, and to investigate the property, funds, and affairs of any domestic corporation. . . ."

Thus, both at common law and under the statute a stockholder is entitled to inspect the property of a corporation and the records pertinent thereto. The reference in the statute to a "lawful demand," the refusal of which gives the court the power to appoint inspectors, can mean only that the stockholder has the right directly to inspect the properties in the first instance as held in the *Hobbs* case. In any event, petitioner here has offered to have the inspection done by independent certified public accountants, petroleum engineers and appraisers.

III

Writ of Mandate is the Proper Remedy in this Case

Corporations Code section 3005 provides, in part:

> "Upon refusal of a lawful demand for inspection, or upon petition of the holders of ten percent (10%) of the issued and outstanding shares, the superior court of the county in which the principal office or in which the records are located may enforce the right of inspection with just and proper conditions * * *."

It has been repeatedly held that mandamus is the proper proceeding by which the court enforces the shareholder's right of inspection (*Johnson* v. *Langdon* (1902) 135 Cal.

624, 625; *Webster* v. *Bartlett Estate Co.* (1917) 35 Cal. App. 283, 285; c.f. *Private Investors* v. *Homestake Min. Co.* (1936) 11 Cal. App. 2d 488, 496).

Moreover, when an application for a writ of mandate is made, "The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided" (Code Civ. Proc. sec. 1107).

In this proceeding, it is submitted that petitioner has shown good cause for the issuance of an alternative writ, and for the prompt hearing of its application for a peremptory writ should respondents fail to permit inspection (Aff. of Charles J. Lee). Petitioner here is entitled to an alternative writ of mandate compelling respondents to permit it to inspect and make extracts from the appropriate records of the respondent corporation or show cause before this Court why they have not done so. In lieu thereof, the Court may also appoint competent inspectors and auditors to investigate the property.

Dated: May 31, 1967.

Respectfully submitted,

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK

By Richard J. Archer
RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

(ORDER TO SHOW CAUSE)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, California 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

———o———

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY, GEORGE G. MONTGOMERY, and DWIGHT M. COCHRAN,
Respondents.

———o———

To KERN COUNTY LAND COMPANY, its agents, servants, attorneys and employees, to the Board of Directors of KERN COUNTY LAND COMPANY, and to GEORGE G. MONTGOMERY and DWIGHT M. COCHRAN:

GOOD CAUSE APPEARING from the verified petition on file,

YOU ARE COMMANDED to appear in and before this Court at its courtroom in Department 16, on June 8, 1967, at the

hour of 9:30 a.m., then and there to show cause why this Court should not issue its writ of mandate commanding you to forthwith make available to petitioner Occidental Petroleum Corporation and to permit agents of said petitioner to inspect the property of Kern County Land Company and all records thereof, or why this Court should not appoint one or more competent inspectors or accountants to investigate the property of Kern County Land Company and its records thereof.

This order, together with copies of the verified petition of Occidental Petroleum Corporation and the memorandum of points and authorities in support thereof, shall be served on you not later than June 1, 1967.

Dated: May 31st, 1967.

ALVIN E. WEINBERGER
Judge of the Superior Court

Exhibit C, Annexed to Foregoing Reply Affidavit

(VOLUNTARY DISMISSAL WITHOUT PREJUDICE)

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK
120 Montgomery Street
San Francisco, California 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

OCCIDENTAL PETROLEUM CORPORATION, a corporation,
Petitioner,

vs.

KERN COUNTY LAND COMPANY, GEORGE G. MONTGOMERY, and DWIGHT M. COCHRAN,
Respondents.

To the Clerk of the above-styled Court:

Petitioner Occidental Petroleum Corporation hereby requests the Clerk of the above-styled Court to dismiss the above-entitled action without prejudice forthwith.

Dated: June 19, 1967.

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

By Richard J. Archer
RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit C, Annexed to Foregoing Reply Affidavit

CERTIFICATE OF SERVICE BY MAIL

RICHARD J. ARCHER hereby certifies:

That his business address is 120 Montgomery Street, San Francisco, California 94104; that he is an active member of the State Bar of California and that he is not a party to the cause.

That on the date hereof he served a copy of

VOLUNTARY DISMISSAL WITHOUT PREJUDICE

on each of the following, by placing one copy of each of said documents in an envelope, addressed, respectively, as follows:

Burnham Enerson, Esq.
McCutchen, Doyle, Brown & Enersen
601 California Street
San Francisco, California 94108

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States Mail at San Francisco, California.

Dated: June 19, 1967

Richard J. Archer
RICHARD J. ARCHER

Exhibit D, Annexed to Foregoing Reply Affidavit

PROGRESS REPORT OF OCCIDENTAL TO SHAREHOLDERS FOR THREE MONTHS ENDED MARCH 31, 1967

(PHOTOSTATS)

(See opposite ☛)

EXHIBIT D, ANNEXED to FOREGOING
REPLY AFFIDAVIT

Three Months Ended
March 31, 1967
and Subsequent Events

Progress Report

OCCIDENTAL PETROLEUM CORPORATION
10889 Wilshire Boulevard
Los Angeles, California 90024

OCCIDENTAL PETROLEUM CORPORATION

Condensed Summary of Operations

	Three Months Ending March 31	
	1967	1966
Consolidated Gross Revenues	$165,508,000	$157,779,000
Net Income	$ 6,744,000	$ 5,123,000
Net Income Per Share*	$ .59	$ .45

*Based on average shares outstanding during periods of 11,489,000 in 1967 and 11,424,000 in 1966.

To the Shareholders:

Your company had the most outstanding first quarter in its 48-year history, both in earnings and in general corporate accomplishments. To summarize, these consist of: a major discovery of oil in the company's second concession in Libya; further development of the discovery in the first Libyan concession; completion of a new off-shore oil, gas and condensate discovery well in the Gulf of Mexico; further expansion in the East Beverly Hills field; and the acquisition of McWood Corporation.

Consolidated net income for the three months ending March 31, 1967 rose to $6,744,000, an increase of 32 percent over the 1966 total of $5,123,000. Per share earnings for the quarter were 59¢, up 31% over last year's 45¢.

Consolidated gross revenues for the initial three months of 1967 reached $165,508,000 compared to $157,779,000 for 1966. The first quarter's increase in profits is primarily attributable to the contributions by the Permian Corporation and McWood Corporation, the company's chemical complex in Florida (which went into operation last fall), increased production from Suwanee River phosphate rock mine, and increases in revenues from the company's sulphur, oil and gas production.

At the Annual Meeting of Shareholders on May 9, 1967, the shareholders approved the creation of a new class of preferred stock which may be used for future acquisitions and other corporate purposes. Ten million shares of the new preferred were authorized.

Major Oil Discovery in Second Libyan Concession

Fresh on the heels of Oxylibya's recent successes and rapid development of the Augila field in Concession 102, the company has just made a major oil discovery with our first test well on the company's second Libyan block, the 728-square-mile Concession 103, some 40 miles west of the Augila field.

The new discovery well, the A1-103, drilled, cored and logged a high porosity pay zone in reefal limestone beds of Paleocene age. A drill stem test of a 35 foot interval (9,454' — 9,489') near the top of the reef flowed clean oil at a metered rate of 5,174 barrels per day. The potential of the discovery can be appreciated when it is realized that the foregoing test interval represents only about 4 percent of the total pay zone, which is in excess of 900 feet. Reefal limestones constitute the reservoir rock of some of the world's most prolific multi-billion barrel oil fields, such as Esso's Zelten field, 60 miles to the west of our Augila field, and some other major fields in the Middle East and Canada.

The well is presently in the process of completion and will be officially tested in the coming weeks. Test rates will be limited to the capacity of the gas-separating and metering equipment available. Like our Augila crude, the new 103 oil is "sweet", meaning that it has a low-sulphur content, but, unlike Augila oil, is low in wax content and has a high gravity of over 44° as compared to Augila's 33° to 37° waxy crude.

Although your company has been negotiating for space in existing pipeline systems, because of the magnitude of the new discoveries, it became apparent that we needed a pipeline of our own. In this connection, your company announced today that it had awarded a contract to the Bechtel Corporation of San Francisco for a preliminary engineering procurement and construction study for the building of a forty-inch pipeline to connect Occidental's Libyan oil concessions 102 and 103 to a marine terminal site on the Mediterranean, a distance of approximately 175 miles.

As soon as a study is complete, the final engineering and construction contracts will be let. The pipeline and terminal are planned to be in operation within 12 months and an ultimate capacity of one million barrels of oil per day will be provided for.

In a ceremony at the Augila field attended by the U.S. Ambassador to Libya, the Honorable David Newsom, and the Libyan Minister of Petroleum Affairs, His Excellency Khalifa Mussa, members of his staff and other local dignitaries, the Minister officially declared Occidental's Augila field "commercial." With the official party in the attendance, the D8-102 well was tested

at a rate of 18,845 barrels of oil per day. The completion of this well makes eight successful wells that have been drilled in the Augila field without a dry hole. Six wells have been completed at a combined tested rate of over 66,000 barrels per day, or an average of approximately 11,000 barrels per day per well. One additional well in the field is now in the completion process, and one is awaiting completion. Our ninth and tenth Augila wells are being drilled.

A second deep drilling rig will be moved, within the next two weeks, to Concession 103 to develop the new reef reserves. Development of these reserves will require relatively few wells owing to the great porosity of the formation which will permit extremely high producing rates per well.

Oil and Gas Development — California:

The successful and rapid development of your company's leases in the Beverly Hills oil field has continued with the completion of the tenth successive well without a dry hole, namely, "West Pico" No. 10 for 2,075 barrels per day of oil plus 955,000 cubic feet per day of gas. Of particular significance is the important addition to reserves which has been established with the discovery of a new deep pool by the drilling of the "West Pico" No. 11 about to be completed. This well found approximately 650 feet of oil and gas bearing sands below the main producing zone. The productivity of the new zone has been established by three open hole drill stem tests. Current daily production from Occidental's Beverly Hills leases is 6,450 barrels per day of oil and 5,460,000 cubic feet per day of gas, compared with 2,200 barrels of oil per day and 800,000 cubic feet per day of gas at the beginning of 1967.

In the Sawtelle oil field, we completed our seventh well, "Dowlen-Federal" No. 7, at an initial tested rate of 2,520 barrels of oil per day with an estimated 2,000,000 cubic feet per day of gas. Over 700 feet of net oil sand was present in this well. "Dowlen-Federal" No. 8 is now drilling in the continued development of the field.

The search for new fields in the prolific Los Angeles Basin is progressing at a fast pace with Occidental planning to drill eight exploratory prospects in the next five months.

East McFaddin Beach, Jefferson County, Offshore Texas:

A new off-shore oil and gas-condensate discovery was made in the Gulf of Mexico, two miles from the coast of Jefferson County, Texas. Occidental holds a 100% working interest in the discovery well and a 66⅔% interest in an additional gas

well and the surrounding 4,200-acre lease block. The successful wildcat, "Texas State Tract 66-S" No. 1 was completed at a total depth of 8,655 feet as a dual oil/gas well. The upper zone produced 37.5° gravity crude oil at the rate of 218 barrels per day. The lower zone produced both natural gas and oil condensate at the rate of 3,200,000 cubic feet of gas and 48 barrels per day of condensate. Production facilities are currently being constructed, and we expect that oil production will commence during the month of June and gas production during the third quarter of 1967. Plans are currently being formulated for a development program for this new field.

North Leroy, Vermilion Parish, South Louisiana:

Your company has a 50% working interest in a new field gas-condensate discovery well in Vermilion Parish, South Louisiana, which was completed November, 1966. Occidental has working interests varying from 25% to 50% in approximately 3,200 acres, and owns 34% of the currently drilling extension well, "F. Vincent" No. 1. This well is being drilled as a one-half mile easterly step-out and has bottomed at a total depth of 12,500 feet. Production casing has been set and electric logs indicate that a highly successful gas-condensate completion can be expected. The original discovery well, "Roy Montet" No. 1 was completed flowing both natural gas and condensate at the rate of 2,800,000 cubic feet of gas and 30 barrels per day of condensate. The Montet well has been producing satisfactorily into the pipeline since January of this year.

Canada:

Occidental and its 62 percent-owned Canadian subsidiary, Jefferson Lake Petrochemicals of Canada, Ltd., ("PETROCHEM") organized a joint venture exploration program during 1966. The joint venture has assembled a highly-competent exploration staff to direct acreage acquisition of attractive exploratory prospects. The joint venture, as of April 30, 1967, held various interests in 2,459,000 gross acres equaling 1,545,000 net acres to the venture. Included in this total are 249,000 acres of Crown oil and gas land permits in the Province of Saskatchewan acquired at a competitive sale in April of this year, which our exploration staff considers an excellent potential for oil and gas production.

Alberta, Canada —
South Okotoks:

The Oxy-Petrochem joint venture drilled the exploratory sour gas wildcat "Jeff Lake-Oxy" 2-21 on the South Okotoks prospect approximately 30 miles southeast of the city of Calgary, Alberta under a farmout agreement from another operator. The 9,032 foot discovery well open hole tested the hydrogen sulphide bearing natural gas from the Crossfield formation at a rate of

1,440,000 cubic feet per day. The hydrogen sulphide content averaged 28% by laboratory tests, thus it will yield approximately nine long tons of elemental sulphur recovery per million cubic feet of raw gas processed. The Oxy-Petrochem joint venture owns a 50% interest in the discovery well and controls an extensive land position of 106,000 acres. The discovery well will be completed with a production rig as soon as equipment is available, and an aggressive development program is being programmed.

Morocco:

The company began an evaluation of a very promising copper prospect in Morocco. The mineralized zone is more than 15.5 miles long and it is anticipated that a basic reserve estimate of one of the zones of mineralization will be available later in the year. Additional areas, totaling 350 square miles, in seven major operations have been selected for other copper exploration and evaluation projects under the terms of the company's protocol agreement with the Bureau of Recherches et Participations Minieres. Occidental has received the exploration rights for copper on a total of 15,000 square miles.

Sulphur Production Exceeds Estimates:

The rapid growth in the company's sulphur operations, both in the United States and through its subsidiary, PETROCHEM, continued through the first quarter of 1967. Consolidated earnings for the sulphur division were up 46% for the first quarter of 1967 over the first quarter of 1966.

The Lake Hermitage Dome in Louisiana is scheduled to go on stream before the end of 1967, with the construction of facilities proceeding according to plan.

PETROCHEM's operations were the best in its history, despite the fact that the Calgary Petrogas Processing Ltd. plant started its annual shut-down for internal equipment inspection and tie-in procedures on its new plant facilities. Income for the period ending March 31st increased 39.4% over the same period of 1966. The Petrogas plant, operated and 31% owned by PETROCHEM, completed its expansion of the acid gas treating and sulphur manufacturing facilities. Preliminary testing of these facilities indicates that they are producing in excess of their designed capacity of 196,000,000 cubic feet per day of commercial pipeline sales gas and 2,000 long tons per day of elemental recovered sulphur. By May 1st, the sulphur plant was in operation and the new pipeline system was close to full operation with a few tie-ins yet to be completed. The construction of the LPG recovery unit is proceeding on schedule. This $16,000,000 plant expansion will approximately double the plant output of sulphur, natural gas and gas liquids from the East Calgary field.

Agricultural Chemicals and Fertilizers Near 1967 Projections:

This has been an unusual year for the fertilizer industry in that the extremely dry weather in the southwest and the extremely wet weather in the Corn Belt has made it difficult to maintain projected goals. The weather factor has also had considerable effect on the supply picture at this time and has tended to cause some price weakness. In spite of this, however, Occidental's wide coverage of the market from California to Maine has enabled your company to stay close to schedule.

Occidental's superphosphoric acid production has been fully employed to help the company keep abreast of the fast growing liquid fertilizer market. Occidental's diammonium phosphate (DAP) and triple superphosphate have been well received by our customers. Rock phosphate sales continue to meet projections, and our products from this new source of rock have enjoyed an unusually high degree of market demand. To meet the increased rock requirements, Occidental's new mine expansion was completed in early May of this year and brings the annual production capacity up to 3 million tons.

Redemption of Convertible Debentures

On May 8th, your board of directors took action to call for redemption all of the company's convertible debentures issued last year, of which about $61,150,000 were outstanding. The redemption date is June 8, 1967, and the last date for conversion of debentures into common shares is May 24, 1967. At the conversion price of $43.89 per share, assuming that all debentures are converted into common shares, an additional 1,393,000 shares will be issued. Through this action a major portion of your company's long term debt will be discharged and shareholders' equity will be increased by $61,150,000, with an annual savings in interest of $3,210,000. The redemption has been underwritten by substantially the same group of investment bankers which were the underwriters for the debenture offering.

Occidental and Kern County Land Company:

Subsequent to the closing of the first quarter, your company announced an offer, effective through June 8, 1967, to purchase 500,000 shares of the capital stock of Kern County Land Company at $83.50 per share in cash to the sellers. However, the overwhelming reaction of Kern County's stockholders to our tender was so favorable that Occidental increased its offer to 1,000,000 shares. As of May 17, 1967, Occidental had over 860,000 shares, or more than 20% of the outstanding shares of Kern County Land Company.

As this is being written, we have been informed that the directors of Kern County Land Company have accepted an offer

from Tenneco, Inc. to acquire all of Kern County's outstanding capital stock on an exchange basis which is estimated to be equivalent to $105 per share. Based on the approximately 900,000 shares which Occidental has purchased, this would indicate a profit to your company of about $18 million, or about $1.50 per share of Occidental stock presently outstanding. Your company reserves the right to oppose this offer or accept it; whichever course is deemed to be in the best interest of our shareholders.

Conclusion:

Occidental is well into the most successful year in its history, and management anticipates that 1967 will be substantially better in both sales and income than 1966, which was your company's previous best year.

Respectfully yours,

Armand Hammer

Armand Hammer, President

May 19, 1967

Exhibit E, Annexed to Foregoing Reply Affidavit

(Report from Wall Street Journal
Monday, June 5, 1967)

Occidental Won't Oppose a Merger of Tenneco, Kern

Tenneco Unit Gets Option to Buy Its Preferred From Occidental After Merger

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Way Cleared for Acquisiton

By a Wall Street Journal *Staff Reporter*

Los Angeles—Occidental Petroleum Corp. said it has decided not to oppose the proposed merger of Kern County Land Co. into Tenneco Inc.

It was also announced that a Tenneco subsidiary has acquired an option to purchase from Occidental the Tenneco preferred stock Occidental would receive if the merger is consummated.

Both Occidental and Tenneco have been bidding for the shares of Kern County, and Occidental said it currently holds about 886,000 Kern County shares as a result of its tender offer at $83.50 a share.

Tenneco's offer to acquire Kern County has been accepted by the Kern County board. The offer calls for Tenneco to give one share of a new $5.50 convertible preferred stock for each Kern County share outstanding.

Under this offer, Occidental would receive 886,000 Tenneco preferred shares for its Kern County holding. It was

Exhibit E, Annexed to Foregoing Reply Affidavit

announced Friday Occidental has given Tenneco Corp., a subsidiary of Tenneco Inc., an option to purchase the Tenneco preferred Occidental would receive if the Tenneco-Kern County merger is consummated. The option isn't exercisable until the middle of December 1967, Occidental said.

Occidental said that while it "had decided not to oppose" the proposed merger of Kern County and Tenneco, "no decision has been made as to the disposition of the Tenneco stock if the option weren't exercised."

KERN COUNTY'S COMMENT

A spokesman for Kern County Land said, "We are, of course, aware of the announcement and were most happy to learn of this decision by the management of Occidental Petroleum Corp. It would seem to remove any possibility of what could have been significant opposition to the combining of Kern County Land Co. with Tenneco."

Terms of the option for Tenneco to purchase the stock from Occidental weren't disclosed.

Tenneco's offer to acquire Kern County calls for issuance of one share of the new Tenneco preferred for each share of Kern County share outstanding.

When the offer was announced last month, Occidental placed the value of the offer at $105 a share. Occidental said it now has about 886,000 Kern County shares as a result of its earlier tender offer for the stock at $83.50. Based on the $105 evaluation, Occidental would make a pretax profit of $19 million on the Kern County transaction.

OCCIDENTAL'S BID OPPOSED

Occidental's tender offer for Kern County Land stock, made on May 8, was opposed by Kern County Land management, which urged holders to wait for a merger that could "prove more beneficial."

Exhibit E, Annexed to Foregoing Reply Affidavit

Directors of Kern County then voted to accept an offer from Tenneco Inc. to acquire the company. The offer is subject to approval of shareholders of both companies and involves an exchange of one share of the new $5.50 convertible preference stock for each of the some 4.3 million outstanding shares of Kern County.

Each Tenneco preferred share has a liquidating value of $100, and is convertible after July 1, 1969, into 3.6 shares of Tenneco Inc. common.

Tenneco shareholders are scheduled to vote on the merger proposal July 11. Kern County has scheduled a shareholder meeting for July 17 to vote on the transaction.

On the New York Stock Exchange Friday, Kern County stock closed at $91, Tenneco at $24.375 and Occidental at $61.

Tenneco is a diversified concern with natural gas pipelines and operations in oil, chemicals and packaging. Kern County is a land developer and Occidental is involved in oil and gas exploration, sulphur mining and the manufacture of fertilizer and petrochemicals.

Exhibit F, Annexed to Foregoing Reply Affidavit

(Letters of July 14, 1967 and July 25, 1967)

(Same as Exhibit E, Annexed to Affidavit of David R. Hyde, printed herein at pages 126a to 128a).

Statement of Kern County Land Company Pursuant to Rule 9(g)

(Document No. 104)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Titles]

Kern County Land Company, a Delaware corporation ("New Kern"), respectfully submits that the following are material facts as to which there is no genuine issue to be tried:

1. On or about May 8, 1967 Occidental Petroleum Corporation ("Occidental") made a public tender offer for 500,000 shares of the common stock of Kern County Land Company, a California corporation ("Old Kern"), a copy of which offer is annexed to the moving affidavit as Exhibit "A".

2. On or about May 11, 1967 the Occidental offer was increased to cover an additional 500,000 shares in accordance with the notice annexed to the moving affidavit as Exhibit "B".

3. Pursuant to the aforesaid offer, Occidental purchased 885,649 shares of Old Kern stock on or after May 8, 1967 at a price of $83.50, plus $1.50 in commissions, per share.

4. At all relevant times Old Kern common stock was a non-exempted equity security registered pursuant to Section 12 of the Securities Exchange Act of 1934.

Statement of Kern County Land Company Pursuant to Rule 9(g)

5. As of May 10, 1967 Old Kern had exactly 4,328,140 shares of common stock issued and outstanding.

6. Tenneco, Old Kern and New Kern entered into an agreement dated as of June 1, 1967, a copy of which is annexed to the moving affidavit as Exhibit "D".

7. The aforesaid agreement between Tenneco, Old Kern and New Kern was closed and consummated on August 30, 1967, at which time:

(a) all of the assets and business of Old Kern were transferred to New Kern (subject to Old Kern's liabilities);

(b) Old Kern transferred to New Kern a specific assignment of "all claims, demands, rights and choses in action accrued to or to accrue to" Old Kern under the Securities Exchange Act of 1934 and the rules promulgated thereunder, a copy of which assignment is annexed to the moving affidavit as Exhibit "G";

(c) Old Kern's name was changed to "600 California Corporation";

(d) Old Kern filed an election to wind up and dissolve with the California Secretary of State;

(e) certificates representing shares of Tenneco Preference Stock received by Old Kern were deposited with Wells Fargo Bank, San Francisco, California, as Exchange Agent, with instructions for distribution of such shares to Old Kern shareholders upon receipt of their Old Kern stock certificates for cancellation and retirement.

8. Old Kern was formally dissolved on October 6, 1967 by the filing of a Certificate of Dissolution with the California Secretary of State.

Statement of Kern County Land Company Pursuant to Rule 9(g)

9. As of August 30, 1967 Tenneco Preference Stock had a value to Occidental of $105 per share.

10. On or about June 2, 1967 Occidental and Tenneco Corporation entered into an option agreement, a copy of which is annexed to the moving affidavit as Exhibit "F".

11. In return for the aforesaid option, Tenneco Corporation paid Occidental $8,866,230.

12. The aforesaid option agreement was exercised and on December 11, 1967 a closing was held at which time Occidental received $84,229,185.

13. On or about September 21, 1967 Occidental received a dividend from New Kern in the amount of $576,744.35 on its Old Kern stock.

14. On or about January 9, 1968, Occidental received a dividend of $1,220,379.88 on its Tenneco Preference Stock.

Dated: New York, New York
May 7, 1970

CAHILL, GORDON, SONNETT, REINDEL & OHL
Attorneys for Kern County Land Company, a Delaware Corporation
Office & P.O. Address
80 Pine Street
New York, New York 10005
WHitehall 4-7400

Affidavit of Simon Rose, Read in Opposition to Foregoing Motion

(Document No. 101)

[Same Titles]

State of New York }
County of New York } ss.:

Simon Rose, being duly sworn, deposes and says:

I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for defendant Occidental Petroleum Corporation ("Occidental"), and I respectfully submit this affidavit in opposition to the motion made for summary judgment on behalf of all plaintiffs in Actions Nos. 1, 2 and 4 above and in opposition to the motion made by plaintiff in Action No. 3 above for summary judgment and other relief, the nature of which is set forth in the moving papers. There is also pending before this Court Occidental's cross-motion seeking, *inter alia*, a dismissal of the 16(b) claims asserted by plaintiffs in Actions Nos. 1, 2 and 4 above on the ground that any such claim, assuming one does exist, belongs to plaintiff in Action No. 3.

This is the second time plaintiffs have moved for summary judgment in this action. The earlier motion was made by plaintiff in Action No. 2 and was concurred in by plaintiff in Action No. 3. In opposition to said motion, defendant submitted the affidavit of its president and chief executive officer, Armand Hammer, sworn to March 5, 1968 (Exhibit "A"), and the opposing and rebuttal affidavits of your deponent sworn to February 29 and March 13, 1968 (Exhibits "B" and "C"). The motion was argued before the late Judge Herlands, who after noting:

> "A number of questions—the complexity of the matter, the difficulty of the technical and legal inter-

> pretation of voluminous documents, the novelty of the questions posed, the critical impact upon the numerous parties to the four pending actions, and the importance of the litigation to the public"

concluded that these factors:

> "persuasively demonstrate that the determination of this summary judgment motion should be stayed and held in abeyance until the general counsel appointed herein shall have had an opportunity to review the pending proceedings and to ascertain and coordinate the positions of the various plaintiffs vis-a-vis this particular motion, including a definitive position as to what transactions (alone or in combination) constitute the allegedly matching 'purchase' and 'sale' in violation of Section 16(b)".

The opinion and order of Judge Herlands was dated and filed on June 14, 1968, and is officially reported in 44 F.R.D. 543.

The moving papers before this Court raise the same facts, the same questions and the same issues which were before Judge Herlands on the earlier motion. Hence, the very factors which prompted Judge Herlands to hold the matter in abeyance pending a further review, should lead this Court to deny plaintiffs' motions for summary judgment pending a full trial on the merits. The relevant authorities on this point are set forth in defendant's opposing memorandum of law.

While it is true that extensive depositions were taken and detailed interrogatories propounded following the filing of Judge Herland's opinion, these depositions and responses to interrogatories, far from establishing plaintiffs' right to summary judgment on these motions, serve to substantiate Occidental's opposition to the various

claims asserted herein. The purpose of this affidavit, therefore, is to bring these additional facts to the Court's attention so that the Court may review them in the light of plaintiffs' assertions.

I

Occidental's public tenders were based entirely upon published facts concerning Kern and not upon any inside information.

Following the decision of Judge Herlands, the depositions of defendant's chief executive officer Armand Hammer, its vice-president in charge of finance Dorman L. Commons, the executive vice-president Walter R. Davis, and its vice-president Thomas Wachtel were taken by plaintiffs in this action. Each testified that, at the time Occidental made its two public tenders for the shares of stock of Kern, Occidental relied upon published reports concerning Kern and not upon any inside information. This was confirmed by the testimony of Frederick Warren Hellman, a partner of Lehman Brothers, whose deposition was likewise taken by plaintiffs in this action.

Hammer testified that "we had looked up some *published* information about the company and we had consulted our investment bankers, Lehman Company, and they thought it was a very good idea for the two companies to merge, that they would compliment one another" (page 8), prior to making any public tender offer. According to Commons, the *published* information consisted of a copy of Kern's 1966 Annual Report, its notice of the annual meeting and proxy statement, a 1961 report of Kern published by Donaldson, Lufkin & Jenrette, a 1965 article in Business Week and an article published in Fortune Maga-

zine (page 23). This was confirmed by Wachtel who testified (pp. 9-10):

> "Q. Did you have before you at any time any financial data on Kern County Land Company? A. Constantly.
>
> Q. What did you have? A. All the published material that was currently available.
>
> Q. Can you be specific as to what that published material was? A. Annual reports, quarterly reports, Moody's, Standard & Poor's, in particular a document—a fairly in-depth document that was put out by Dean Witter on the Company".

and by Hellman who stated (page 11):

> "Q. What material did you have on Kern? A. Annual reports—only publicly available material.
>
> Q. Can you give us, generally, the public material that you had? A. Annual reports, Standard & Poor's cards, Moody's Industrial Manual, Standard & Poor's Stock Guide, the normal sources of public material on publicly-owned companies".

It was on the basis of these published reports that Hellman concluded that a public tender offer of $83.50 per share would be successful and fair to Occidental. Davis testified (page 13):

> "Q. Did Mr. Hellman indicate to anyone at those conferences that he thought that $83.50 a share was a safe price to pay? A. He felt like it was a price that the tender offer would be successful and he felt like it was a price *from the public information that we had of Kern County Land, the published statements and proxy materials*, that it represented

a fair, a good buy for Occidental". (Emphasis supplied)

II

Occidental was prevented by Kern from submitting a more competitive bid than Tenneco since, unlike Tenneco, Occidental was denied access to Kern's internal records.

The record shows that immediately after Occidental announced its tender offer, Kern took affirmative steps to prevent its takeover by Occidental. Not only did it write letters to its shareholders, strongly urging them to reject Occidental's offer, but it also commenced negotiations with Tenneco, Inc. ("Tenneco") with a view to a merger with that company in order to defeat Occidental's attempt to acquire control of Kern.

The record further shows that Tenneco was permitted to examine and study the files and records of Kern before submitting any offer, but that such right was denied Occidental, despite its ownership of more than ten (10) percent of Kern's outstanding shares of stock. Hence, it is not surprising that Tenneco, armed with inside information, was able to submit a more attractive offer than Occidental, who was compelled to rely upon public information in determining the extent of its bid. As stated by Mr. Davis (pp. 87-8):

> "This was a figure we arrived at on public information and we did not have access to the evaluation of all of their property. It was a figure which we were willing to negotiate around if they would be kind enough to furnish us with detailed evaluations that we needed to make a further consideration."

Affidavit of Simon Rose, Read in Opposition to Foregoing Motion

That Tenneco had the benefit of inside information at ne time it submitted its offer to Kern was in fact conceded y Dwight M. Cochran, president of Kern, in his deposition. Ie testified (pp. 17-21):

"Q. Was there any discussion at this first conference of Tenneco's desire to learn something more about the affairs of Kern that it had been able to get up to that time? A. Yes, sir.

Q. Will you tell me in detail what the discussion was? A. Well, the Tenneco people indicated before they made their final proposal to us, that they wanted some information about our company. They wanted to talk to some of our people in the various departments and find out whatever information they thought they needed in order to make a proposal.

Q. What was your response? A. My response was we were perfectly willing for them to talk to anyone and we instructed our own people to cooperate with them fully.

Q. You say you instructed your own people. Who did you instruct? A. Well, Mr. Hartman, the financial vice president, Mr. Reid, the head of our Oil and Minerals Department, Mr. Rand, the head of our Real Estate Department and our cattle people down in Bakersfield, our farming people in Bakersfield, and also the heads of our subsidiaries, Walker, Case, Watkins and Johnson."

* * *

"Q. Did Mr. Hartman report to you what his conferences were with the Tenneco people who were seeking information? A. Generally.

Q. What did he say to you, what did he inform you? A. He informed me he gave them the figures they wanted and the books of account they wanted to

look at, I guess depreciation schedules and any other thing that a buyer would be interested in looking at.

Q. As far as you know, what did the Bakersfield people, those who were in charge of oil down there, transmit by way of information? A. They were in San Francisco.

Q. What did they transmit, as far as you know, to Tenneco? A. I am sure they talked about the quantity of reserves that we had and our production rates, schedules, not only on our own lands, but as a result of some of the exploration efforts we had made, some of which were internal, and probably gave them a great mass of detailed information.

Q. Was the same true of the cattle people and the land people? A. Yes, I am sure that is right."

* * *

"Q. Did you assign an office to the Tenneco people at Kern headquarters during this period of time so they could work there? A. Yes, sir."

* * *

"Q. In this mass of information given to the Tenneco people, was there information that had not been made public? A. Yes, sir.

Q. Was there information which was not available to other stockholders, to the stockholders of Kern? A. To the stockholders generally, yes, there was."

This was likewise confirmed by Tenneco in its response to plaintiff's written Interrogatory No. 19 seeking information as to any oral discussions between Tenneco and Kern with regard to the purchase of Kern assets by Tenneco.

Affidavit of Simon Rose, Read in Opposition to Foregoing Motion

"ANSWER TO INTERROGATORY No. 19.

May 10. Telephone call between George Montgomery, Sr. (Chairman of the Board of Kern) and Gardiner Symonds, in which Mr. Montgomery authorized Tenneco representatives to visit the offices of Kern in order to study financial data and petroleum reserves.

May 10. Mr. Symonds contacted W. T. Wells, Jr. and Cliff W. Rackley (Vice Presidents of Tenneco Oil Company) and requested they go to California to offices of Kern to make valuation study of Kern's oil reserves.

May 11. Messrs. Wells and Rackley met with Messrs. Cochran, Hartmann and Reed (officers of Kern) and were given permission to examine certain oil reserve studies in Kern's Bakersfield office. Messrs. Wells and Rackley were in Kern's Bakersfield office May 11 through 14.

May 14. Messrs. Symonds, W. E. Scott (President of Tenneco Oil Company) and E. Wayne Hopkins (Vice President of Tenneco Inc.) arrived in San Francisco and met with Messrs. Montgomery, Cochran, Enersen and Hartmann on May 15, and were allowed access to all published financial data of Kern and certain budget information.

May 16. Mr. Symonds met again with Messrs. Cochran and Montgomery for general discussion of framework within which Tenneco might make an offer. Mr. Symonds left San Francisco for New York the same day, but Mr. Scott remained in San Francisco to coordinate information assembled.

May 15. Charles S. Taylor, Jr. arrived in San Francisco and on the same day he met, for the first time, Messrs. Montgomery and Cochran.

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> May 16. Mr. Taylor met with Mr. Howard Hawkins (Secretary of Kern) for purposes of obtaining access to corporate records, employee benefit programs, long range financial commitments and property records. On the same day he met with Messrs. Burnham Enersen and Morris Doyle (members of the firm of McCutchen, Doyle, Brown & Enersen, General Counsel to Kern) and requested information concerning pending litigation, stockholder relationship and other matters of legal significance.
>
> All of the foregoing are the persons representing Tenneco in discussions with persons representing Kern prior to May 19, 1967."

Cochran also conceded in his deposition that Occidental was not given equal access to its records:

> "Q. I take it the answer to my question is no, you did not give [Occidental] the same access to your records as you gave Tenneco? A. That is correct."

III

The Circumstances Surrounding the Option Agreement Between Occidental and Tenneco Demonstrate Tenneco's Anxiety to Remove Occidental as a Substantial Minority Stockholder.

After the Board of Directors of Kern had accepted the offer of Tenneco and had rejected the offer submitted by Occidental, Davis recommended to Hammer that an effort should be made to dispose of the new Tenneco shares so as to avoid a long and costly proxy fight with Kern over the acceptance of Tenneco's offer by Kern shareholders (*Davis*, Deposition, page 28). At the time Davis made his recom-

mendation it was believed that the Tenneco offer on the basis of published information represented a good deal for the Kern shareholders and that any proxy fight opposing its acceptance would likely be unsuccessful. As stated by Davis:

> "It was clear even if Occidental waged a costly and bitter proxy fight, it was unlikely that the KCL-Tenneco transaction could be stopped. * * *. I personally felt that the price that Tenneco, the deal that they had made for the Kern County stock, was, based upon public information * * * a pretty good deal * * *." (page 55)

After discussing the recommendations of Davis with other representatives of Occidental, it was concluded by Hammer that the best interests of Occidental would be served by Davis exploring the possibility of disposing of the Tenneco shares in the advance of any proxy contest (*Davis,* Deposition, pp. 28-9). Thereupon Davis contacted Henry Gardiner Symonds, then Chairman of the Board of Directors and Chief Executive Officer of Tenneco, who was most anxious to acquire Occidental shares. Hammer testified:

> "Q. Did Mr. Davis report to you after his meeting that day with Mr. Symonds in Houston? A. Yes.
>
> Q. What did Mr. Davis say to you * * * ? A. *He told me that Mr. Symonds was eager to get our shares* and that the price, $105 was apparently acceptable, * * *." (pp. 49-50) (Emphasis supplied)

This was in effect conceded by Mr. Symonds who testified:

> "A. I might add, we considered the fact that Occidental would own a large block of Tenneco prefer-

> ence, an unfavorable part of the transaction, but we didn't think it was critical" (page 37)

and that:

> "A. • • • I didn't want to have, assuming that the tender went through, • • • to have Occidental as a large preference stockholder of Tenneco." (page 45)

This was also confirmed by Tenneco's Vice-President and Associate Counsel Charles S. Taylor, Jr., in his response to plaintiff's written Interrogatory No. 48:

> "Q. State the factors which led to the acquisition by Tenneco Corporation of the option from Occidental for the purchase from Occidental of 886,623 shares of Tenneco's Preference Stock? A. The Business judgment of Mr. Gardiner Symonds, Chairman of the Board of Tenneco Corporation, as ratified and approved by the Board of Directors by resolution, adopted August 14, 1967."

In the course of his deposition, Davis testified (pp. 33, 37) that Symonds raised the question of possible 16(b) liability to Occidental at the first meeting and that:

> "A. After a preliminary draft had been drawn of the option agreement and our attorneys telling me they felt like this was satisfactory under certain conditions, I called Dr. Hammer who was in London at that time and reviewed it with him and asked him if it met with his approval. • • • He said if Mr. Al Brown and Mr. Bruce Mann (Occidental's attorneys) felt like it was satisfactory, it was satisfactory with him." (p. 38)

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IV

Occidental agreed to execute the option in reliance on Tenneco's promise to do whatever was necessary to hold Occidental free from any 16(b) liability.

In the course of his deposition, Davis testified that at his first meeting with Henry Gardiner Symonds, then Chairman of the Board of Directors and Chief Executive Officer of Tenneco, on May 30, 1967, "Mr. Symonds pointed out to me that there was a possibility of a 16B problem" (page 33), to which he replied "Well, obviously we can't make any dispostion of our stock or make any other moves which are illegal but I feel as smart lawyers you got and as smart lawyers we got, you ought to be able to figure out to do this thing to make it legal. I am not in a position to discuss the legalities of this" (page 34). Mr. Symonds "suggested we meet in Mr. Daum's office which was the next day" and for our lawyers "to get together and figure out how to do it." After the terms of the option agreement had been agreed to, Davis reminded Symonds "that many of the matters which came up these two days were technical matters which [he] was not familiar with", that he "had come to him as a businessman feeling that what [he] came to him about was both good for Tenneco and Occidental and if we had any problems, how he would feel about it because [he] had to rely in good faith on him as a businessman outside of the attorneys which were there which I felt we were doing the right thing" (page 42). On that occasion Symonds assured Davis that "he would do anything possible to help us in the event any problems arose" (page 42), which he again confirmed on a later occasion:

> "Q. I think you testified that Mr. Symonds said he would do all he could to help on 16B problems?
> A. Yes.

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Q. Did you ever call Mr. Symonds and remind him of that statement that he made? A. • • • I came back up here and talked to him but I never called him.

Q. Did you say on the second occasion when you talked to him he also stated in substance that he would do what he could help on 16B problems? A. Yes.

Q. Did he say that on two occasions? A. Yes." (pp. 75-6)

Hammer was also examined with regard to the assurances made by Symonds. He stated that Davis told him that "there had been some discussion about some legal questions in connection with the sale of the stock, and that • • • Mr. Symonds had assured him that he would do everything he could to see that we had no legal difficulties" (page 50). Davis also told Hammer:

"it was agreed that between Mr. Symonds' attorneys and our attorneys they should be able to work out the transaction so that Occidental would get its profit and have a capital gains without any legal difficulties." (page 50)

• • •

"A. As I recall it, Mr. Davis said that Mr. Symonds promised him that he would do whatever was necessary and help in every way he could so that Occidental would have no legal difficulties in consummating the transaction." (page 55)

• • •

"A. He simply said that Mr. Symonds had assured him that he would do everything he could. That we would have no problems. And that between

his attorneys and our attorneys they ought to be clever enough to work it out in a proper fashion." (page 59)

Upon cross-examination by your deponent, Symonds was obliged to confirm what Davis and Hammer had stated in their depositions:

"Q. Was there at least one occasion where you and Mr. Davis were together when the attorneys were busily engaged on their part of the work and you had some conversations with Mr. Davis? A. I think there could have been. They were brief." (page 83)

• • •

"Q. Did Mr. Davis say to you that he was unfamiliar with many of the technical matters that had been discussed between the lawyers? A. I think he did and I think I would have said that I also was unfamiliar with the technical details. We both disclaimed any knowledge." (page 83)

• • •

"Q. Did Mr. Davis say he was relying on you in good faith as a businessman to insure that Occidental had no problems under Section 16(b) or otherwise? A. No, he did not. I think he would have liked to have put those words in my mouth.

Q. Did he say that to you? A. I don't remember, but if it was implied, I did not accept it.

Q. Didn't you respond by saying you would do everything possible to assist in the event any problems arose? A. I think we had done that, Mr. Rose, in writing an option to purchase Tenneco preference stock which option was not exercisable until six months after the transaction and that was as far as

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I knew anything about 16(b) and I thought we had gone the full distance with it at that time.

Q. My question wasn't what you have done. My question was did you tell him on that occasion, either June 1st or June 2nd during the course of those meetings that you would do everything possible to assist Occidental if it experienced any problem? A. So long as it was within the law, I think that was the implication.

Q. Did you tell him that? A. Only by general conversation. I don't think I told him I would do this.

Q. So long as it was within the law, you indicated Tenneco would assist Occidental in any problem it might have under Section 16(b)? A. The agreement was in good faith I think I would have implied that." (pp. 83-5)

At page 46 of his deposition, Symonds likewise confirmed that the purpose of the option was to avoid any possible 16(b) problem to Occidental:

> "A. That there might be a 16(b) problem and that counsel for Occidental and counsel for Tenneco agreed on this document, the option agreement and that was it."

In the light of these admissions, Tenneco's claims are unwarranted and in bad faith.

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V.

The Agreement and Plan of Reorganization and Kern's Proxy Statement are consistent with Tenneco's promise to assist Occidental in avoiding a possible 16(b) liability.

Article 7.9 of the Agreement and Plan of Reorganization ("Plan") between Kern and Tenneco provided:

> "The closing under this Agreement and Plan of Reorganization shall take place at the offices of Kern * * * on such date *not* earlier than September 30, 1967 and *not* later than December 31, 1967 as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon." (Emphasis supplied)

Although the Plan was dated as of June 1, 1967, the record shows it was prepared subsequent to Symonds' assurances to Occidental and Occidental's execution of the option agreement on June 2, 1967. Indeed, Symonds testified that the Plan was reduced to writing "some time around the middle of June" 1967 (page 22).

The significance of the dates specified for the closing of the Plan—not earlier than September 30, 1967 and not later than December 31, 1967—will become apparent when viewed in the light of the fact that, as a further precaution, Occidental, early in June 1967, sought a ruling from the Securities and Exchange Commission exempting the transaction from the provisions of Section 16(b) in the event that it was deemed to fall within the purview of that Section. Not only was Tenneco aware of this fact, but, as conceded by David R. Hyde in paragraph 71 of his affidavit in support of the motion for summary judgment in Action No. 3, a copy of Occidental's application was submitted to Tenneco's

attorneys on June 5, 1967. When asked to explain the significance of the closing dates inserted in the Plan, Symonds testified that he had no personal knowledge and that they were inserted by counsel (dep. p. 86). He added that "[m]y counsel knew from practice that we wanted a transaction of any kind and certainly one this size, we wanted the earliest possible closing and they would work to that end." (id.)

Although the consummation of the Plan was conditioned upon obtaining a ruling from the Internal Revenue Service that the transaction was a taxfree reorganization, counsel could scarcely have contemplated that such a ruling would not be forthcoming prior to December 31, 1967. Undoubtedly, the September-December dates were related to Occidental's possible 16(b) problems. It was hoped that a favorable ruling from the Securities and Exchange Commission on Occidental's application for exemption would be obtained prior to December, in which case there would have been no obstacle to a closing immediately following receipt of the ruling. If, on the other hand, Occidental was unsuccessful in its application, it would be necessary to delay the closing until the end of December in order to protect Occidental's position consistent with Symonds' promise to Davis that Tenneco would give every possible assistance in order to avoid the possible 16(b) problems with which Occidental might then be faced.

Occidental's assertion that Tenneco promised to assist it in avoiding a possible 16(b) liability is further confirmed by the fact that the proxy statements issued by Tenneco and Kern made no reference whatsoever to a potential recovery under that Section. Symonds, when questioned as to this, testified:

> "Q. In the proxy statement dated June 16, 1967, I believe, there was no reference to a possible recovery under Section 16(b)? A. No.

Q. Isn't that because Tenneco in June 1967 had no intention of closing the transaction prior to December 30, 1967 unless Occidental got a ruling from the SEC prior to that date? A. That is not a correct statement.*

Q. Do you know of any other reason why reference to a potential recovery under Section 16(b) was omitted? A. I do not know of any reason.

Q. I take it that you knew enough about 16(b) to know that if the closing took place, if the closing didn't take place prior to December 9, 1967, there would have been no question of a recovery under Section 16(b)?

The Witness: Would you read that one back? (The question was read.)

A. As of the date we made the agreement with Mr. Davis, my full knowledge of 16(b) was, and of capital gains under the Revenue Act, if a six-month period elapsed, that cured it.

Beyond that, I knew nothing more or none of the finer points of 16(b) actions and I thought we had cured the only one by the terms of this option and the rest of it was something I was not in knowledge of." (pp. 89-90)

Cochran impliedly confirmed his knowledge of the understanding reached between Symonds and Davis with the following testimony:

"Q. During the course of the discussion with you as to what the content of this [proxy statement]

---

* This, of course raises an issue of credibility which cannot be resolved on this application. Indeed, on a motion for a summary judgment, the opposing party Occidental is entitled to have all the evidence viewed in the light most favorable to it and to have each and every doubt or inference resolved in its favor.

should be, was there any discussion as to whether this * * * should also include a reference to the possible liability of Occidental to Kern for 16(b) profits? A. No, sir, because we didn't know there was possible liability."

* * *

"Q. At the time that this proxy statement was issued to the Kern stockholders, it was your belief that there was no cause of action against Occidental for short swing profits? A. I was so advised." (dep. pp. 42-3)

The failure of Kern or Tenneco to refer to a possible 16(b) recovery is all the more revealing when contrasted with a prospectus issued in May 1968 in connection with a sale by Tenneco of 1,455,996 shares of the Watkins-Johnson Company. Of this total, 1,403,000 shares were acquired by Tenneco under the Plan as part of the business and assets of Kern and the remaining 52,996 shares were acquired by purchase for $2,273,661.00 on March 14, 1968. Under a heading "Offering by Tenneco Corporation", the prospectus contained the following statement:

"Because of the requirements of Section 16(b) of the Securities Exchange Act of 1934, *if the closing for the sale to the Underwriters of the shares offered hereby is completed within six months of March 14, 1968,* Tenneco Corporation will pay over to Watkins-Johnson any excess over $2,273,661 of the net proceeds realized by Tenneco Corporation from the sale of 52,996 of such shares. Accordingly, to the extent of such excess, Watkins-Johnson will receive a portion of the proceeds of this offering and any such amount will be added to the general funds of Watkins-Johnson and used for general corporate purposes". (Emphasis added)

Thus, although a 16(b) claim had not matured at the date of the prospectus, Tenneco felt obligated to reveal the existence of a *potential* claim. There is no valid reason why Kern and Tenneco would not have made a similar disclosure with respect to a potential recovery from Occidental if, indeed, they believed such a possibility existed. The absence of such reference by either Kern or Tenneco can be explained only by the fact that Tenneco's assurances to Occidental with respect to the avoidance of any 16(b) liability precluded the possibility of such a recovery.

VI

After Kern's shareholders had accepted Tenneco's offer, Tenneco breached its agreement with Occidental by refusing to delay the closing as requested by Occidental in order to eliminate any possible question of 16(b) liability.

After the Agreement was approved by Kern shareholders on July 17, 1967, Occidental learned that Tenneco and Kern were endeavoring to close the Plan even prior to September 30, 1967, in violation of the assurances given by Symonds to Davis and notwithstanding that such early closing might result in a possible 16(b) liability to Occidental. Upon learning this fact Davis met with Symonds to remind him of his prior assurances and to request him to delay the closing until December 1967 which Symonds refused to do. As stated by Davis:

> "A. Dr. Hammer told me that he had been informed of the possible liability and I told him I felt like if the agreement had been entered into in good conscience on both sides and I felt like I should come to New York and discuss this with Mr.

Symonds to try to resolve whatever problems we might have". (pp. 48-9)

• • •

"Q. Did Dr. Hammer accept your suggestion that you come to New York and discuss the matter with Mr. Symonds? A. Yes.

Q. Did you have this discussion with Mr. Symonds? A. Yes". (page 49)

• • •

"A. I went over with Mr. Symonds the problems that had been pointed out to me or possible problems that might be involved in this and asked him if he had any ideas about how we could work around them to keep from getting into long litigation over the matter. • • • I told him • • • that I really expected him to live up to his agreement to help us any way he could if we had any problems • • •. [H]e asked me if I had any suggestions and I related to him the suggestion • • • that the closing date be postponed and he said that was impossible, he felt that he would be liable to his stockholders if he did anything to postpone this matter of the closing date". (pp. 50-1).

• • •

"A. I saw him in his office and specifically asked him if they could delay the closing of the Kern County-Tenneco merger and he said he could not do that. He felt that his attorneys advised him he would have some legal problems if he delayed the closing • • •." (page 76).

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The testimony of Davis is supported by the testimony of Hammer who testified:

"Q. Did Mr. Davis inform you whether there was any discussion with Mr. Symonds at the Houston meeting about a closing date for the sale of Kern assets to Tenneco? A. As I recall it, Mr. Davis said that Mr. Symonds promised him that he would do whatever was necessary and help in every way he could so that Occidental would have no legal difficulties in consummating the transaction.

Q. And in connection with that report to you did he tell you that one of the things which was being discussed was the date upon which Tenneco and Kern would close the sale of Kern assets to Tenneco? A. My best recollection was that it was going to be some time in December.

Q. Was this recollection that you have about when the closing was to be or what Mr. Davis reported to you? A. What Mr. Davis reported to me". (pp. 55-6).

• • •

Q. Did Mr. Davis have any further conference with Mr. Symonds after he had this conversation with you that you have just described?" (page 74).

• • •

A. Yes.

Q. What do you remember about it now? A. I think as I recall he told me he did go to New York and he had a conference with Mr. Symonds, and he reminded Mr. Symonds of his agreement with him that Mr. Symonds would do everything possible and everything he could so that we would have no legal problems in connection with the transaction.

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Q. Do you recall whether he reported to you that he discussed with Mr. Symonds the possibility of a change in the closing date for the transfer of Kern assets for Tenneco preference stock? A. Yes, he mentioned that Mr. Symonds seemed to be anxious to close prior to the six-months period. And said something about the morale of the stockholders and —I mean of the employees—and some other reason, I don't recall, why he—either he or the Kern County people wanted to close before the six-months period was up". (pp. 75-6).

• • •

Q. On page 20 if you will, please, sir, down about two-thirds the sentence begins:

"Furthermore, Occidental did not expect the merger timeable to be rushed through in such a way as would precipitate a 16-B problem by reason of the merger even if such ruling was not obtained from the Securities and Exchange Commission".

Now what was the basis of that statement, Doctor? A. The basis was the conduct of the parties and the agreements, verbal and written, all—

Q. That's all I am interested in. A. All of which led to the conclusion that it was the intention of the parties that Occidental would not have a 16-B problem.

Q. What were the verbal and written agreements? If so I want them furnished. A. Well, the first one was the one between Gardiner Symonds and Mr. Davis". (pp. 322-3).

• • •

"Q. The second was what? A. The second one was the meetings between the attorneys, Mr. Daum, Mr. Brown, Mr. Mann.

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> Q. Which resulted in the option agreement, is that correct? A. Which resulted in the option agreement and also resulted in certain other conversations". (page 323)

The record shows that not only did Tenneco close with Kern on August 30, 1967 in violation of its agreement with Occidental but such closing was in violation of an outstanding restraining order issued by a Texas District State Court on August 21, 1967. Moreover, on August 30, 1967, Tenneco obtained from Kern a specific assignment of any and all claims it may have against Occidental under Section 16(b), thus attempting to recapture more than twenty (20) percent of the price it had agreed to pay Occidental for the new Tenneco preferred stock. Cochran testified:

> "Q. Did your counsel discuss with you the amount that might be involved in this possible liability of Occidental to Kern? A. Counsel discussed whether or not Kern had any cause of action in connection with the option and as I recall it, we were advised, number one, it was regarded as an option and number two, that if there was a cause of action, it wouldn't mature until after the deal closed.
>
> Q. You mean after the transfer of assets actually took place? A. Yes, sir.
>
> Q. Was there any discussion by your counsel with you as to the amount that might be involved? A. We knew that they paid $8 million or something as down payment on the option but whether or not that was the amount or the full price or the difference of the price of the stock between the option price and what they sold it for or what they acquired it for and their option price, that is something I guess the Court is going to have to decide. We didn't know." (pp. 33-4).

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Q. You knew at that time, your counsel had already indicated to you a possible liability, did he not? A. Our counsel advised us this was an option, number one and number two, we had no cause of action until the deal was closed.

Q. Did your counsel advise you that when the deal was closed you might have a cause of action? A. Not specifically, because they still said it was an option." (page 43)

This testimony not only confirms the motive which prompted Tenneco to seek an earlier closing, but also shows that the option in question was a bona-fide option and not a disguised contract of sale within the meaning of Section 16(b) as urged by the moving plaintiffs on this application. This issue will be discussed in greater detail in defendant's opposing brief.

Likewise significant is the testimony of Symonds. At page 35 of his deposition he stated:

"Q. Specifically, was there ever any discussion with you at or prior to August 30, 1967 with regard to the transfer from Kern to Tenneco of any existing 16(b) violation of Occidental or any possible liability from Occidental to Kern under Section 16(b)? A. I am sure that following my discussions with Mr. Davis and the option agreement that ensued, that there was the possibility of such claims arising."

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VII

The option price as well as the call price for the six-month option were based upon current market values and not upon any inside information. The option executed in favor of Tenneco did not afford Occidental any benefit which was not equally available to other Kern shareholders.

The option price of $105 per share was based upon the expert opinion of Hellman of Lehman Brothers as to the value of the Tenneco offer accepted by Kern. As shown above, Hellman was rendering opinions and giving advice on the basis of published information and not upon any inside information. Hellman testified:

> "Q. Were you asked to do anything concerning the Tenneco offer toward valuing it? A. I was asked to give an opinion as to—preliminarily as to what I thought it was worth per—what I thought it would sell for in the market place.
>
> Q. Did you give such an opinion? A. Yes.
>
> Q. What did you say? A. I thought that it was worth about $105 a share. Now, that's a—that was a preliminary opinion, an opinion which was based on what I knew as of that moment." (page 89)
>
> Q. This evaluation that you made, the $105, that was made after you had learned, of course, of the acceptance of the—the director acceptance of the Tenneco proposal and on the same day? A. Right." (page 94).

This was likewise confirmed by the testimony of Hammer and Davis. Hammer stated:

> "Q. You have previously testified that at some time in the conversations after you had been advised

of the Tenneco proposal to Kern, that you had Mr. Hellman give you an opinion of what the Tenneco proposal amounted to in dollars; is that correct? A. Yes.

Q. Do you remember when that was? A. No, I don't.

Q. Well, at any rate, he gave you his opinion that the value of the Kern shares that you owned in Kern had a value in his opinion of around $105 a share; is that correct? A. Yes." (pp. 239-40).

and Davis testified (pp. 29-30, 90):

"Q. In your conversation with Dr. Hammer, had you discussed a price that you would be asking for your shares? A. Yes. The doctor said if we made any kind of deal for our shares, he felt it should not be—or should be somewhere around what the valuation had been placed on by Mr. Hellman with Lehman Brothers.

"Q. Somewhere around $105. A. Yes."

* * *

"A. To the best of my recollection, I told Mr. Symonds that our investment banker had come up with a figure that he felt the stock would be worth like $105 a share after it was issued in the market place and as I recall his comment on it, he felt like it would probably be worth, by that time, because of activities in their company, it would probably be worth $115 or $120 and why would we be concerned about holding it.

That is all the conversation I remember now about values of the stock, because this figure had been given to me by Mr. Hellman of Lehman Bros. as his idea of what the stock would sell for when it went into the market place."

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When it was suggested that Occidental grant Tenneco a six (6) to a fourteen (14) month option or call upon the new Tenneco shares, Davis telephoned George Gould of Donaldson, Lufkin & Jenrette, the recognized experts on this subject, to inquire what the normal call price for such a term would be upon stock then selling at $95 or $96. Gould indicated a price between $9 and $12 a share. With regard to this matter, Mr. Davis testified:

> "when we talked of options, called Donaldson, Lufkin & Jenrette, which was an investment banking firm in New York and asked them what they felt like a call, which is what I call it, a call on stock that was selling at that time would sell for, normally sell for. They told me something between $9 and $12 depending on if there were any conditions outside of the normal call that you would find in the open market.
>
> Q. You were talking about the Kern County stock? A. Yes.
>
> "Q. What was Kern County stock selling for at that time? A. I don't know. As I recall, it was 95 or 96. I am not positive of that." (pages 36-7)
>
> • • •
>
> "Q. You referred to a telephone call to Donaldson, Lufkin & Jenrette? A. Yes.
>
> Q. Who made that? A. I made it." (page 73)
>
> • • •
>
> "Q. What was the question you asked them? A. The question that I asked them was that what a normal call would sell for on a stock that was priced around 95 or 96." (page 73)
>
> • • •
>
> "Q. Do you recall who you spoke to specifically? A. Mr. George Gould.

Q. Did you say how long the call would be? A. A six-month call.

Q. And he gave you an answer right there on the telephone? A. Yes." (page 73)

On the basis of this advice, Davis concluded that a call price of $10 per share would be fair and reasonable under the circumstances. This was acceptable to Tenneco and led to the payment by Tenneco to Occidental of $8,866,230 upon the latter's execution of the option in favor of Tenneco with regard to 886,623 shares in question (Exhibit "F", Hyde Affidavit). That this payment represented a call price for the option and not a down payment is clear from the testimony of Davis (page 97):

"Q. Mr. Davis, with respect to your call to Donaldson, Lufkin & Jenrette, do you recall that one of the purposes of that call was to fix a reasonable down payment on the option? A. No, I don't remember this part of it. I remember talking about the price of options, but I don't remember talking about the down payment. I never heard of a down payment on options, but I don't recall that."

Unlike the usual call transaction, Tenneco reserved the right to the return of the call price in the event it was unable to consummate its deal with Kern, as well as the right to apply the entire call payment in reduction of the purchase price if it elected to exercise the option after the closing of its deal with Kern. This, of course, represented a benefit to Tenneco since normally the call price would never be returned for failure to exercise the call or allowed as an offset against the purchase price of the shares involved in the event the call is exercised. In these circumstances, it cannot be contended that the option afforded special bene-

fits to Occidental which were not equally available to other shareholders. On the contrary, faced with the prospect of being locked into a minority position with an investment of over $75,000,000, as a result of the merger agreement entered into between Kern and Tenneco, Occidental was compelled to grant benefits to Tenneco under the option which other shareholders would not have been required to do. As indicated above, any other shareholder would have been in a postion to negotiate a similar call on its shares without any obligation to return the call price or apply it in reduction of the purchase price. It should also be borne in mind that, as the record shows, all the other Kern shareholders were aware of the existence of the option prior to voting on the Plan and had approved the Plan with full knowledge of the option terms.

VIII

Tenneco's acceptance of the option was not conditioned upon Occidental's discontinuance of pending lawsuits or proposed proxy fights or upon voting its shares in favor of the Tenneco offer.

That Tenneco's acceptance of the option was not conditioned upon any agreement that Occidental would discontinue its pending lawsuit against Tenneco seeking to obtain inspection of its books and records, or that it would not engage in a proxy fight or that it would vote its Kern shares in favor of the Tenneco offer was conceded by both Kern and Tenneco in their responses to plaintiff's written interrogatories as well as in their oral depositions. It was also confirmed by Occidental in response to plaintiff's

written and oral questions. Kern was asked the following questions to which it gave the following answers:

> "*Interrogatory No. 51:* State whether there was any oral discussion between anyone on behalf of Kern and anyone on behalf of Occidental with regard to securing the support of Occidental to the proposed sale of the assets of Kern to Tenneco, or an agreement that Occidental would not oppose the proposed sale.
>
> *Answer:* No."

> "*Interrogatory No. 53:* State whether there was any correspondence between anyone on behalf of Kern and anyone on behalf of Occidental with regard to securing the support of Occidental for the proposed sale of the assets of Kern to Tenneco, or an agreement that Occidental would not oppose the proposed sale.
>
> *Answer:* No."

which was confirmed by Tenneco's response to a similar written interrogatory:

> "Interrogatory No. 52. State whether the purchase by Tenneco or Tenneco Corporation of said option from Occidental was conditioned upon Occidental's either supporting the proposed sale of Kern's assets to Tenneco or agreeing not to oppose said sale.
>
> Answer to Interrogatory No. 52. No."

and by Occidental:

> "47. State whether the purchase by Tenneco or Tenneco Corporation of said option from Occidental was conditioned either explicitly or implicitly upon

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Occidental's supporting the proposed sale of Kern's assets to Tenneco or agreeing not to oppose said sale.
ANSWER: No."

With regard to Occidental's pending lawsuits, Symonds of Tenneco and Cochran of Kern testified:

"Q. I understand after they had contracted to sell the stock you might assume that they would no longer be interested in a stockholder action, but what I am trying to find out is, whether either Mr. Brown or Mr. Daum or Mr. Davis told you that this litigation would be dismissed if the option agreement was signed? A. No * * *." (*Symonds*, page 52)

* * *

"Q. Did you learn or were you told that Occidental had agreed to drop its pending suit for examination of Kern books? A. No." (*Cochran*, page 59)

The same was equally true with regard to the proposed proxy fight of Occidental as shown by the testimony of Davis and Commons:

"Q. Did you inform Mr. Symonds that the purpose of your sale of the Kern County stock was to prevent or avoid a proxy fight? A. No, I didn't put it that way because I didn't feel that way. * * *" (*Davis*, page 40)

* * *

"Q. Was there any discussion at any time in your presence that if Tenneco purchased Kern stock from Occidental that Occidental would refrain from a proxy fight? A. No." (*Commons*, page 106)

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Nor was there any agreement by Occidental to vote in favor of the Tenneco offer as contended by plaintiffs herein. As stated by Cochran:

> "I felt it such a good deal I really didn't care so long as Occidental didn't own any more stock than it owed then, that even if they voted against it, our share owners would approve it." (page 55)
>
> • • •
>
> "Q. Did you state in June of 1967 that the option agreement between Occidental and Tenneco removed the possibility of significant opposition to the sale of the Kern assets in Tenneco? A. No." (page 60)

Cochran also testified that although "it turned out" that Occidental did not oppose the sale of Kern assets by Tenneco, it was equally true that Occidental did not vote in favor of the sale (page 61). With regard to the letter read by Occidental at the meeting of the Kern shareholders in July 1967 (Exhibit "B", Abrams Affidavit), Cochran conceded that this was not done pursuant to any prior agreement between the parties:

> "Q. Were you ever told that Occidental had agreed to send a letter to the Kern stockholders explaining its position and the fact it wasn't opposing the sale of assets? A. I wasn't told that and I didn't know there was going to be such a letter until a man appeared at our annual meeting and read one." (page 59)

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IX

Plaintiff's contentions with regard to defendant's affirmative defenses and counterclaims are devoid of merit.

Plaintiff in Action No. 3 has also moved in the alternative for an order pursuant to Rule 12(f) dismissing all of Occidental's affirmative defenses for legal insufficiency, some of which have also been pleaded as counterclaims. As to these counterclaims, said plaintiff requests summary judgment in its favor.

Insofar as the affirmative defenses are concerned, since defendant's allegations must be deemed to be admitted for the purposes of this motion, the only issue before this Court is their legal sufficiency. With regard to the counterclaims, any factual argument made by plaintiff must be totally disregarded by this Court, since the moving affidavit is made by an attorney lacking personal knowledge of the facts and therefore without any probative value on this application.

First Defense: Tenneco (New Kern) having conceded for the purpose of its application the accuracy of all the foregoing facts, it follows that plaintiff has failed to set forth any claim upon which relief can be granted.

Second Defense: Tenneco argues that even conceding that it consummated the Plan with knowledge of, and in deliberate and willful violation of, an outstanding restraining order for the purpose of creating a colorable claim under Section 16(b) against Occidental and that its instant action is predicated entirely upon its contemptuous conduct, nevertheless any defense based upon these admitted facts is legally insufficient since it tends to defeat its 16(b) claim under the Statute. This argument would only have

validity if it could be shown that the Statute was intended to grant a plaintiff a recovery regardless of its wrongful and contemptuous conduct in acquiring the claim. Such a contention, we submit, is legally absurd and devoid of merit. We know of no authority supporting such a position and none has been cited to this Court by any of the moving plaintiffs. For the same reasons, defendant's Third Counterclaim involving the same admitted facts as above, precludes this Court from granting or even considering plaintiff's motion for summary judgment. The applicable authorities are set forth in defendant's opposing memorandum.

THIRD DEFENSE: Tenneco likewise concedes for the purposes of its motion that the Court which issued the restraining order had the power to direct it and others to purge themselves of their contemptuous act by undoing the very closing upon which it relies in support of its 16(b) claims against Occidental and thus render such claims premature and dismissible. However, it contends that said defense was rendered legally insufficient by reason of the subsequent order of Judge Brewster of the Federal District Court of Texas and the later dismissal of the very State Court action in which the restraining order was issued. But these events occurred subsequent to the commencement of the instant action and since the validity or legal sufficiency of defendant's defense must be judged in the light of the facts as they existed at the time plaintiff commenced its action, they are not properly before the Court.

FOURTH DEFENSE AND FIRST COUNTERCLAIM: Tenneco contends that even assuming that it breached its agreement with Occidental in closing prior to December 9, 1967, that the breach caused damage to Occidental in excess of its 16(b) claims and that the claims were the result and

natural consequence of its breach of contract, nevertheless this defense and counterclaim are legally insufficient since they would tend to deprive it of any 16(b) claims under the Statute. In this instance, plaintiff construes the Statute as if it were intended to protect any claim acquired by wrongful conduct against the very person who had been damaged by reason of plaintiff's conceded breach of agreement. We respectfully submit that this was not the intention of Congress in enacting Section 16(b) of the Securities Act and that there is no authority sustaining such an immoral contention.

FIFTH DEFENSE AND SECOND COUNTERCLAIM: Here Tenneco argues that even assuming that the proxy statement issued to the shareholders prior to their acceptance of its offer to Kern was false and misleading, that but for said false and misleading statements or representations the Plan would not have been consummated prior to December 9, 1967 and that Occidental would not have been damaged in an amount in excess of its 16(b) claims, this defense and counterclaim are legally insufficient because they would tend to deprive it of any 16(b) claims. This contention assumes that the Statute was intended to protect *any* matching event under 16(b), even one brought about by a clear violation of another section of the same Securities Act. Merely to state the proposition is to demonstrate its utter absurdity.

Similar considerations apply to defendant's Fourth Counterclaim predicated upon plaintiff's violation of Rule 10b-5 of the Securities Act in connection with the closing; to defendant's Fifth Counterclaim based upon plaintiff's violation of the California Statutes, and to defendant's Sixth Counterclaim founded upon the breach of fiduciary duties by plaintiff and others. All these counterclaims, as well as defendant's Seventh Counterclaim, are based

upon the same facts above which must be deemed to be admitted and all are legally sufficient and meritorious. Furthermore, since several of these counterclaims are not the subject of any application before this Court and since each of them seeks damages in excess of plaintiffs' claims, they likewise preclude this Court from granting or even considering plaintiffs' motions for summary judgment.

X

Where the amount of the counterclaim exceeds the amount of the complaint and arises out of the same acts or occurrences alleged in the complaint, the Courts will not entertain any motion for summary judgment by plaintiff in the absence of a disposition of said counterclaims.

The relevant authorities are set forth in defendant's letters to the Court dated February 17, and March 12, 1970 and therefore need not be repeated here. It will suffice to state that defendant's counterclaims are not only meritorious, but each claim damages in excess of the amount demanded by the complaint and are compulsory in nature within the meaning of Rule 13 of the Federal Rules of Civil Procedure.

General Counsel for plaintiffs in Actions Nos. 1, 2 and 4 has moved for summary judgment without regard to defendant's counterclaims, whereas the affirmative relief sought by plaintiff in Action No. 3 extends also to four of those counterclaims. We have demonstrated above that the attack upon said counterclaims is devoid of merit, with the result that neither moving plaintiff is entitled to a summary disposition of its 16(b) claims prior to a final disposition of all of defendant's counterclaims.

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XI

Even assuming liability under Section 16(b), recovery would be limited by the profit on 450,278 shares.

Even assuming, *arguendo,* that plaintiff in one of the actions were to establish a claim under Section 16(b), in any event the recovery would not extend to the profit realized on the "sale" of *all* of the 883,331 shares purchased pursuant to the tender; it would be limited to those shares acquired by which it became a 10% owner and the shares acquired thereafter, viz., 450,278 shares.

As the record shows, the two public tender offers of Occidental were irrevocable and unconditional, with the result that each tender, upon receipt, constituted a separate and distinct transaction. The tender of May 8 provided that:

> "Occidental will purchase all shares properly tendered by the expiration of the offer up to 500,000 shares. Occidental may at its option purchase all or any part of any shares tendered in excess of 500,000 shares."

This was repeated by Occidental in its subsequent offer of May 11:

> "Occidental Petroleum Corporation made an Offer, dated May 8, 1967, to purchase the first 500,000 shares of Kern County Land Company's Capital Stock tendered in accordance with the Offer, reserving the right to purchase any or all additional shares tendered, on the basis of order of receipt.
>
> "Response of Kern County Land Company stockholders to the Offer resulted in the tender of more than 500,000 shares during the first three days of

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> the Offer. Occidental Petroleum Corporation hereby announces that it will purchase on an order of receipt basis the next 500,000 shares, subject to the terms of the Offer. The right is reserved to purchase all or any part of any shares tendered in excess of the next 500,000. Preference will be given to those received first."

Unlike the usual tender offer where the offeror reserves the right to accept or reject any tender received, Occidental was legally obliged to accept each and every tender submitted in accordance with the terms of each of its offers up to 500,000 shares, with the result that each tender of stock upon receipt gave rise to a separate and distinct transaction.

The irrevocable nature of Occidental's offers was conceded by plaintiff's counsel in Action No. 3 at page 7 of his moving affidavit:

> "On Monday, May 8, 1967, Occidental publicly announced over the Dow Jones broad tape that it would purchase up to 500,000 shares of Old Kern on a first-come-first-served basis at a price of $83.50 per share net, plus a $1.50 per share commission to brokers transmitting shares. *The offer was not made contingent upon Occidental's receiving 500,000 or any given number of shares, but committed Occidental to purchase all shares tendered up to 500,000* * * *." (Emphasis supplied)

and by plaintiff in Action No. 1 at page 4 of his moving affidavit:

> "Under the terms of the tender offer, Occidental promised to pay, on a first-come, first-served basis, $83.50 cash for each Old Kern share tendered before 5:00 P.M. on June 8, 1967, up to 500,000 shares."

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In the course of his deposition, Dr. Hammer was asked the following questions by General Counsel and by Counsel to plaintiff in Action No. 3 to which he gave the following answers:

> "Q. What were the terms of the tender offer? A. I think the price was $83.50 and I think it was on a first-come-first-serve basis.
>
> Q. Was it on an irrevocable basis? A. Yes." (page 21)
>
> • • •
>
> "Q. What were the terms of the second tender offer? A. They were similar to the terms of the first offer.
>
> Q. An additional 500,000 shares? A. Yes.
>
> Q. Same price? A. Yes.
>
> Q. Also an irrevocable offer? A. Yes." (page 25)
>
> • • •
>
> "Q. Now, you so worded, or the tender was so worded so that once those shares were tendered, they couldn't withdraw them; is that correct? A. That's correct.
>
> Q. And you were bound to take all that came up to the 500,000 on a first come, first serve basis? A. Yes." (page 297)

That each tender resulted in a separate stock transaction upon receipt was likewise confirmed by defendant's Senior Vice-President in charge of finance, Dorman L. Commons in his deposition:

> "Q. When were the tendered shares paid for, Mr. Commons? A. We arranged with the banks to make payment for the shares as soon as they were acquired, as soon as we had good certificates.

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Q. Do you know when the shares were finally paid for? A. Well, *payment was made daily.* We set up arrangements with the banks for *daily payment* as soon as good certificates were presented to us." (Emphasis supplied)

The record shows that at 2:46 P.M., May 10, 1967, Occidental became a ten (10) percent owner of Kern Stock for the first time. Prior thereto Occidental had received proper tenders aggregating 433,053 shares of Kern stock which was a little less than ten (10) percent of Kern's outstanding capital stock as set forth in Kern's Form 10-K report to the Securities Exchange Commission. In said report Kern claimed it had outstanding 4,332,090 shares of stock.

Hence in determining defendant's liability, if any, under Section 16(b), these 433,053 shares are to be excluded from any computation since as conceded by counsel for plaintiff in Action No. 3 at page 22 of his moving affidavit ("Occidental is accountable under Section 16(b)" only "for profit realized on those shares acquired in the purchase by which it became a 10% owner and on all shares acquired thereafter."

WHEREFORE, it is respectfully submitted that plaintiff's motions be denied in all respects and that an order to that effect be entered accordingly.

SIMON ROSE

(Sworn to May 28, 1970.)

Exhibit A, Annexed to Foregoing Affidavit

(Affidavit of Armand Hammer and Exhibits Attached, Read in Opposition to Plaintiff's Motion in Mukamal Action)

UNITED STATES DISTRICT COURT

Southern District of New York

Isaac Mukamal,

Plaintiff,

against

Occidental Petroleum Corporation, Tenneco Inc., KCL Corporation and Kern County Land Company,

Defendants.

State of California)
County of Los Angeles) ss.:

Armand Hammer, being duly sworn, deposes and says:

I reside at 10431 Wyton Drive, Los Angeles, California. I am the president and chief executive officer of Occidental Petroleum Corporation ("Occidental") and also Chairman of the Board of Directors of said corporation. I have personal knowledge of most of the facts set forth herein and I respectfully submit this affidavit in opposition to plaintiff's motion for partial summary judgment with respect to the first count of his complaint.

I

In late March or early April 1967, Mr. Eugene Reid, Senior Executive Vice President of Occidental, contacted

Exhibit A, Annexed to Foregoing Affidavit

Mr. Larry Reid, Executive Vice President of Kern County Land Company ("Kern"), on a number of occasions, for the purpose of discussing a possible merger of the two corporations. Mr. Eugene C. Reid was told by Mr. Larry Reid that the latter favored such a merger and would take it up with his fellow directors. He subsequently asked for additional copies of Occidental's last Annual Report. He agreed to set up an appointment for a meeting with Mr. Dwight Cochran, the President of Kern, who was in Hawaii and was expected to return shortly. I later learned that Mr. Cochran had returned, but there was no word from Mr. Larry Reid about the proposed meeting. Meanwhile, in the mid-April, 1967, Occidental's investment banker had purchased on the market from time to time 1900 shares of Kern's stock for Occidental's account. These shares were reported to the Securities and Exchange Commission by Occidental as owned by it.

In late April, 1967 it became obvious to Occidental that unless it acquired a substantial block of Kern's stock, the management of Kern would never be interested in discussing any possible merger between the two companies. Rather than to try to acquire these shares on the open market, Occidental decided to make a public invitation for tenders.

Occidental, however, had no access to a list of Kern shareholders, and therefore could not communicate with them directly. Accordingly, during the first week in May, 1967 space for advertising was reserved in the Wall Street Journal and other papers for Tuesday morning, May 9, 1967. At that time the trading volume in the Kern stock on the New York Stock Exchange aggregated several hundred shares per day. However, on Friday, May 5, 1967, several thousand shares were traded and the price of Kern stock on the New York Stock Exchange went up one and one-half point to $63\frac{5}{8}$. It was felt that some

leak must have developed and that therefore it would be necessary to make the public announcement or invitation for tenders on Monday, May 8, 1967, instead of waiting till Tuesday, May 9, 1967, as planned. This decision was made on Sunday, May 7, 1967.

On the same day, your deponent telephoned the president of Kern, Mr. Dwight Cochran, to advise him of Occidental's intention to make a public tender offer for Kern shares. Your deponent suggested a meeting with Mr. Cochran and offered to go to his home in San Francisco to discuss the situation. However, Mr. Cochran said he had a social engagement and he could not see your deponent until Monday, May 8th.

On Monday morning, May 8th, the public invitation for tender of all or any part of 500,000 shares of Kern at $83.50 a share was released to Dow Jones and published on the broad tape. The offer of $83.50 was approximately $20 above the closing market price of Kern stock on the New York Stock Exchange the previous Friday, May 5, 1967. The newspaper advertisements, however, appeared the next day since it was impossible to reserve the space for Monday morning's papers when the decision was made on Sunday to move the offer from Tuesday to Monday. A copy of such public invitation is annexed to plaintiff's moving papers as Exhibit "C".

II

Under said offer, Occidental agreed to purchase up to 500,000 shares of Kern stock for a net cash price of $83.50 per share, which offer was to remain in effect until June 8, 1967. The offer also provided that:

> "Occidental may at its option purchase all or part of any shares tendered in excess of 500,000 shares."

Exhibit A, Annexed to Foregoing Affidavit

As a result of said offer, Occidental received on May 8 and 9, 1967, tenders from Kern stockholders representing in the aggregate 278,810 shares of Kern stock, which was less than 10% of the outstanding capital stock of Kern. According to plaintiff, at the time the public offer was made by Occidental, Kern had outstanding approximately 4,330,440 shares of capital stock; however, according to Kern's Form 10-K report to the Securities Exchange Commission, it had outstanding 4,332,090 shares of stock.

On May 10, 1967, Occidental received additional tenders from numerous individual stockholders during the course of said day which in the aggregate involved an additional 228,245 shares of Kern stock. These tenders when added to the tenders previously received by Occidental on May 8 and 9, 1967, represented 507,055 shares of Kern's capital stock, which was more than 10% of the outstanding capital stock of said corporation. According to the internal records of our receiving agents, Occidental received tenders equal to or in excess of 10% of Kern's outstanding capital stock on May 10, 1967, 2:46 P.M. Prior thereto, Occidental had received tenders representing 433,053 shares of Kern's capital stock.

On the same day, May 10, 1967, Kern sent a letter to each of its shareholders to discourage them from accepting the public offer of Occidental. The letter was signed by the president of Kern, Dwight M. Cochran, and by the Chairman of its Board of Directors, George G. Montgomery, and is annexed hereto as Exhibit "1". It stated in part:

> "As you undoubtedly know, Kern County Land Company is currently the object of a raid, an obvious and transparent scheme aimed at control of your company. Newspapers of Monday, May 8, carried the story that Occidental Petroleum Cor-

poration was making an offer to you and our other Share Owners for 500,000 or more shares of Kern County Land Company stock.

Occidental's move came with no preliminary notice to our management. Our first knowledge of the attack was a telephone call Sunday afternoon, May 7, from Armand Hammer, president of Occidental. He did not reveal the terms of his offer. He was urged then to present any ideas he might have that would benefit KCL Share Owners before making the tender offer; we have always been eager to explore ideas profitable to the Company. Instead he went ahead with the announcement and we could assume only that he had no confidence in his ability to convince our management and Board of Directors that a merger between KCL and Occidental would be in your interest."

• • •

"At noon, May 8, a special meeting of the Kern County Land Company Board of Directors met to explore every facet of the situation. *Our most urgent recommendation was and is that you do NOT tender your shares, that we use every legitimate means to frustrate Hammer's ambition to take over your Company.*

We fully realize how tempting his offer may seem. Your most obvious reason for refusing to tender your shares, however, is simply the fact that you can do better.

It is obvious that Hammer wants control of Kern County Land Company. *It is obvious he cannot control your Company with 500,000 shares.* It is obvious that further offers must be made and the

price certainly would not be less." (Emphasis supplied)

• • •

"It should be equally obvious to the thoughtful investor that Kern County Land Company has others than the opportunist at Occidental interested in mergers. We have in hand at this time a number of offers from strong and reputable corporations to discuss merger possibilities—mergers that could result in tax-free exchanges of stock rather than the taxable Hammer scheme—and your Board of Directors has been giving full consideration to such opportunities.

We remind you that once your shares are tendered, you cannot withdraw them. They will be frozen at that price until the expiration of the offer, whenever that may be. We earnestly recommend that you resist being routed into precipitate action by Hammer's tactics.

We have other sound reasons for fighting this power grab."

• • •

"Armand Hammer, it must be admitted, has evaluated the Company *better than have most outsiders*. He fully appreciated the fact that our 1.8 million acres of land are carried on our books at a fraction of their market value and that no discovery value is assigned the oil reserves underlying our California lands. Obviously he, too, sees the growth ahead that we expect for KCL. Obviously he agrees with us that the real value of a share of KCL stock greatly exceeds $83.50 or he would not offer that amount. Indeed, his offer is $85 per share, including the extraordinary and enticing $1.50 per-share bonus

to brokers that he seems to think necessary to implement his scheme." (Emphasis supplied)

• • •

"We have tremendous faith in the abilities of the splendid team of employees we have assembled in our program of change and growth. We believe Kern County Land Company shares will be worth more in five years as Kern County Land Company shares than they will be worth as shares of a company raided by Occidental.

We believe completely that a takeover by Hammer and Occidental would not be in the best interests of KCL and its Share Owners. We believe completely that your interests will be better served if you retain your shares in KCL and participate in the growth made possible by our years of careful preparation." (Emphasis supplied)

In view of the excess tenders received by Occidental from the shareholders of Kern, Occidental on Thursday, May 11, 1967, extended its public offer to cover an additional 500,000 shares of Kern at the same net price of $83.50 per share. This offer likewise was to expire at 5:00 P.M. June 8, 1967 (Pacific Daylight Time). The reason for the extension was stated as follows:

"Occidental Petroleum Corporation made an Offer, dated May 8, 1967, to purchase the first 500,000 shares of Kern County Land Company's capital stock tendered in accordance with the Offer, reserving the right to purchase any or all additional shares tendered on the basis of order of receipt.

Response of Kern County Land Company stockholders to the offer resulted in the tender of more than 500,000 shares during the first three days of

the Offer. Occidental Petroleum Corporation hereby announces that it will purchase on an order-of-receipt basis the next 500,000 shares, subject to the terms of the Offer. The right is reserved to purchase all or any part of any shares tendered in excess of the next 500,000. Preference will be given to those received first."

On the same day, May 11, 1967, Kern sent the following telegram to its shareholders (Exhibit 1A, annexed hereto):

> "The announcement today by Hammer of Occidental that he is extending his offer confirms our advice to you that his grab for your shares is a raid, an effort to seize control of Kern County Land Company. Let me repeat; you must not be stampeded by Hammer into hasty action. There is no sound reason why you should sell now. I urge you to give most thoughtful consideration to the letter we have sent to you. Do not tender your shares in KCL. Dwight M. Cochran, President Kern County Land Company."

and on May 15, 1967, Kern sent a second letter to its shareholders likewise for the purpose of discouraging their acceptance of Occidental's public offer (Exhibit "2", annexed hereto). This letter was again signed by the president and by the Chairman of Kern's Board of Directors. It stated:

> "Since we last wrote to you, a number of additional companies have indicated interest in possible merger with our Company.
>
> Talks are under way with selected companies, but for obvious reasons we cannot at this time reveal the name of any corporation under consideration. However, we want you to know that discussions

are being actively pursued and that representatives of Morgan Stanley & Co. and White, Weld & Co., leading investment bankers, are assisting us in our negotiations and evaluating proposals made to us.

KCL is adamant in its position that control by Occidental would be detrimental to our Share Owners. The fact that discussions with other companies are being held would not normally be publicized, but Occidental has sought to panic our Share Owners into hasty action with a 'first-come—first-served' tender offer.

So we want you to know that we are working toward arrangements that should be far more beneficial to your interests than the Occidental tender offer."

Notwithstanding the foregoing, Occidental persisted in its efforts in trying to talk with the officers of Kern concerning a possible merger between the two companies. Finally, in response to one of these calls, Occidental was advised by the officers of Kern that Kern was holding a directors' meeting at noon on May 19, 1967 to consider available offers of merger. At that time Occidental had received in response to its public offer additional tenders on May 16, 17 and 18, 1967 representing in the aggregate 143,050 shares of Kern's stock, which, when added to the prior tenders received amounted to 883,331 shares of Kern stock.

On Friday morning, May 19, 1967, Occidental made two proposals to the Kern management to merge the two companies on a basis of Occidental's issuing its preferred stock convertible into the common stock of Occidental. Each offer was presented by Occidental as a basis for negotiations, but Kern was unwilling to discuss either of said merger proposals. Finally, late on the day of May 19, 1967, Kern announced that its Board of Directors had voted

to accept an offer of merger with Tenneco, Inc. ("Tenneco"), and when Occidental inquired as to the terms of the Tenneco offer they were told "Read about it in the newspapers".

On the same day, May 19, 1967, Kern released for public distribution a statement (Exhibit "3", annexed hereto) wherein it stated in part:

> "San Francisco, May 19—The Board of Directors of Kern County Land Company voted today to accept an offer of Tenneco Inc., subject to the approval of the share owners of both companies, President Dwight M. Cochran announced.
>
> Tenneco, Cochran explained, will offer one share of a new convertible preference stock for each share of Kern County Land Company stock. The new stock will have one vote per share, a cumulative dividend of $5.50 per share and a liquidation value of $100, he pointed out. Each share will be convertible after July 1, 1969, into 3.6 shares of Tenneco common stock, and will be non-callable for 10 years. It will then be callable at $110, declining $1 per year to $100. The transaction will be accomplished on a tax-free basis to KCL share owners.
>
> • • •
>
> " 'The Board considered all proposals the company had received, one of which was from Occidental Petroleum Corporation, which is currently seeking KCL shares through a tender offer,' Cochran said. 'Directors at the meeting voted unanimously in favor of the offer made by Tenneco.' "
>
> • • •
>
> *"KCL revealed last week that it was considering proposals from other companies and urged its share owners not to tender their shares to Occidental. 'The*

most obvious reason,' Cochran and Board Chairman, George G. Montgomery said in a special letter May 10, is simply the fact that you can do better.

'The Tenneco offer,' Cochran declared today, 'certainly bears out our earlier advice to our share owners.'" (Emphasis supplied)

As a result of said announcement, Occidental receipt of tenders from Kern's shareholders diminished very rapidly, as follows:

May 19—tenders representing in the aggregate only 468 shares.

May 22—tenders representing in the aggregate only 800 shares.

May 23—tenders representing in the aggregate only 983 shares.

May 24—tenders representing in the aggregate only 729 shares.

May 25—tenders representing in the aggregate only 296 shares.

June 5—tenders representing in the aggregate only 100 shares.

which, of course, disposes of plaintiff counsel's contention that Occidental had acquired "an additional 376,326 shares of Kern Capital Stock" with full knowledge of Kern's merger negotiations with Tenneco (Miller's Affidavit, p. 4). Indeed, as shown above, between May 19, 1967, the date Kern's Board of Directors first announced its acceptance of the Tenneco offer, and June 8, 1967, the date Occidental's public offer expired, Occidental received tenders representing only 3,376 shares of Kern's capital stock, which was less than 1/10th of 1% of Kern's outstanding capital stock.

Exhibit A, Annexed to Foregoing Affidavit

III

From the foregoing, it is obvious that Kern's management sought from the outset to prevent and did, in fact, succeed in preventing Occidental from acquiring a controlling stock interest in Kern by approving a defensive merger agreement with Tenneco without the knowledge or consent of Occidental within eleven days after the date of publication of the tender offer by Occidental which first called to the attention of the Kern shareholders the fact that the price of their shares was grossly out of proportion to their value as known to Kern insiders. As shown by the article appearing in Business Week, July 22, 1967, after your deponent telephoned Kern's president on Sunday, May 7, 1967 advising him of Occidental's public offer, Kern's Chairman of the Board of Directors on Thursday, May 11, 1967, telephoned Tenneco Chairman H. Gardiner Symonds for assistance. As stated by Mr. Symonds:

> "It was flattering to us that they [Kern] came to us when they were in trouble. They asked if we thought we could come up with a competitive offer."

The article then goes on to state that:

> "A week later, on May 19, Tenneco made its offer, *which K C L directors accepted the same day,* subject to the stockholders approval * * *." (Emphasis supplied)

Contrary to what plaintiff's counsel seems to suggest in his moving affidavit, neither Occidental nor your deponent had or was given access to, any information whatsoever concerning a possible merger between Kern and Tenneco at the time Occidental made and acted upon the public offer to acquire 1,000,000 shares of Kern for the price of $83.50 per share. Indeed, neither Occidental nor your deponent had any contact whatsoever with Tenneco during

the period it was acquiring Kern stock pursuant to public offer, nor was any arrangement, direct or indirect, to enter into any kind of relationship made with Tenneco during said period. As a matter of fact, during said period neither Occidental nor your deponent had any conversations with Tenneco or any of its officers, or with Kern or any of its officers, relative to the disposition of the Kern stock which Occidental had acquired pursuant to its tender offer prior to Kern's announcement of its Board's acceptance of the Tenneco proposal on May 19, 1967.

Actually, the first notice your deponent had that Tenneco and Kern had agreed to merge was on May 19, 1967, at which time Occidental published no further public offer for Kern stock.

IV

Commencing May 22, 1967 Occidental requested the opportunity to inspect and make extracts of the stock ledger, books of account, minutes of proceedings of the stockholders, directors and executive committee of Kern, together with all records, books and documents referred to in said minutes or made a part thereof. Occidental particularly asked to see the minutes of the meeting of the Board of Directors of Kern which had accepted the offer of Tenneco. When told that those minutes had not yet been prepared, Occidental requested an opportunity to examine the Tenneco offer and other relevant documents which had been acted upon by Kern's Board of Directors at said meeting.

While Occidental was permitted to see some books and records in view of its stock ownership, it was denied access to the stockholder list and to any of the records of the stockholders, directors or executive committee in May 1967 and any papers with respect to the Tenneco offer or any other offers. As a result, Occidental, on May 25, 1967 commenced a civil action against Kern in the Superior Court

of California for the City and County of San Francisco, No. 579283, seeking access to the Kern records which had been denied to it.

Occidental, now a substantial shareholder of Kern, had to decide on whether to oppose the Kern-Tenneco merger for various reasons. Kern and Tenneco, on the other hand, were desirous of avoiding a possible proxy fight with Occidental in connection with the Kern stockholders meeting which would be required for approval of the Kern-Tenneco plan. They also were desirous of having the power to eliminate Occidental from the combined company, when, as and if the plan was consummated. Since Occidental had many other interests, it was believed by Kern and Tenneco that Occidental would be willing to waive any possible proxy fight and to surrender its stock ownership in Kern if Occidental could be assured of a closing date beyond December 9, 1967.

During the latter part of May and the first days of June, 1967, Mr. Gardiner Symonds, Chairman of the Board of Tenneco, Mr. Walter R. Davis, Executive Vice President of Occidental, Albert Brown, Esq., counsel for Occidental, and F. Arnold Daum, Esq., counsel for Tenneco, met to discuss the situation. At that time Occidental's action against Kern for disclosure of corporate information and list of stockholders was still pending.

At these meetings various methods and procedures were discussed as to how to implement the respective objectives of the two companies in carrying out the Kern transaction with Tenneco, the final results of which were as follows:

(a) Under date of June 2, 1967 an option agreement was entered into between Occidental and Tenneco Corporation, a wholly-owned subsidiary of Tenneco (Exhibit "3A", annexed hereto), whereby Tenneco's subsidiary was given

the option to purchase 886,623 shares * of Tenneco preference stock which Occidental would receive when, as and if the Kern-Tenneco Plan was consummated, for a total price of $93,095,415.

The option would run for a period from 6 to 14 months. The price of the stock was to be $105 per share and the price for the option was to be $10 a share or $8,866,230. The latter amount was to be returned if the Kern-Tenneco plan was not consummated by July 31, 1968 and was to be applied on account of the purchase price of the stock if the option was exercised. These terms were negotiated at arm's length and were based on advice from investment bankers as to the value of the Tenneco preference stock and the prevailing price for a "call" to purchase such stock.

Mr. F. W. Hellman of Lehman Brothers was acting as investment banker adviser to Occidental on all matters concerning Kern and, later, Tenneco. He had accompanied the Executive Vice President of Occidental at the time Occidental made its specific offers of merger to Kern on May 19, 1967. Sometime prior to the meetings in the latter part of May and first days of June, 1967, between representatives of Occidental and Tenneco, Occidental requested Mr. Hellman's opinion as to what the market price of the Tenneco Preference Stock would probably be when issued. Investment bankers of a caliber of Lehman Brothers are constantly retained for the purpose of evaluating securities to be issued in corporate acquisitions, reorganizations, and underwritings. Mr. Hellman advised that in his opinion, under then current market conditions, the Tenneco preference stock could be expected to command a market price upon issuance of approximately $105 per share.

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* This option also included the 1900 shares of Kern acquired by Occidental prior to the making of its public tender offer on May 8, 1967.

Exhibit A, Annexed to Foregoing Affidavit

With respect to the price of the option charged to Tenneco's subsidiary for the "call", Occidental sought advice from Mr. Gould of the firm of Donaldson, Lufkin & Jenrette as to what the market price would be for such a call. Mr. Gould's firm, among other things, engages in the business of selling put and call options. He advised that for a six-months option with the Kern stock selling around $94 a share, $10 per share as a call price of the Tenneco preference stock would be very reasonable. He stated that call prices for six months vary from 10 to 16 percent and that he did not recall in ten years' time seeing one under 10 percent. Furthermore, this call was unusual in that the buyer of the call gets his money back if the Tenneco preference stock is not issued by July 31, 1968. Mr. Gould advised that on calls for when and if issued stock, the buyer of the call usually loses his money if the transaction is not consummated.

At pp. 7-8 of his moving affidavit, plaintiff's counsel states that as a result of said option Occidental has in fact received preferential treatment not available to the other Kern stockholders by reason of its "inside position". Such contention, your deponent submits, is devoid of merit and without factual basis.

As shown above, the price of the stock and the price of the option in the Option Agreement were not the result of insider's influence by Occidental, but were fixed by experts in the field as the "going prices" on the basis of arm's length negotiation. Indeed, if there was any pressure exerted, the pressure would be *on* Occidental and not *by* Occidental. At that time Occidental was in the position of having lost its bid to merge with Kern. It would have over $75,000,000 of its assets tied up in a minority position with Tenneco but, being a 20 percent owner of one class of equity security of Tenneco, it would have to find a private buyer who would take the shares for investment

or try to induce Tenneco to register the shares so that it could sell them on the market.

Moreover, such contention overlooks the fact that Occidental did not negotiate the option with uninformed members of the public, but directly with Tenneco. Your deponent submits that it is preposterous to even imagine that Occidental, an outsider as conceded by Kern, had any inside information which was not equally available to Tenneco. As shown by the record, Tenneco was given every possible bit of information about Kern as recited in the Merger Plan. The possibility of any unfair use or abuse of inside information would therefore be by Tenneco, clearly an insider, against Occidental, the resisted outsider.

Undoubtedly any of the Kern shareholders could have sold a call on the Tenneco preference stock, when and if issued, on terms at least as favorable as Occidental obtained *provided* they were willing to agree not to dispose of either their Kern stock or their Tenneco stock for a period which might extend from a minimum of 6 to a maximum of 14 months, regardless of what the market might do in the meantime. As a matter of fact, it appears probable that the other shareholders could have made a better deal in that the usual price of a call on when issued stock is *not* repayable to the purchaser in the event the main transaction is not consummated.

The option further provided that Tenneco's subsidiary could not in any event exercise the option prior to December 10, 1967. If the Kern-Tenneco plan was closed prior to December 10, 1967, the option expired on December 31, 1967; but if the plan was closed on or after December 10, 1967 but prior to July 1, 1968, then the option expired on the 30th day after the closing.

(b) The dates and periods in the Kern-Tenneco Agreement and Plan of Reorganization made as of June 1, 1967

(Exhibit I of the moving papers) were fixed by the parties to be consistent with, and to permit the carrying out of, the agreement and understanding reached at the same time between Tenneco and Occidental and acquiesced in by Kern.

At that time Occidental was hopeful that having done everything openly and fairly and without access to any inside information, it would be possible to obtain an exemptive ruling from the Securities and Exchange Commission that there would be no 16(b) problem resulting from Occidental's surrender of more than 10 percent of the Kern shares pursuant to the merger plan between Kern and Tenneco. Furthermore, Occidental did not expect the merger timetable to be rushed through in such a way as would precipitate a 16(b) problem by reason of the merger even if such ruling was not obtained from the Securities and Exchange Commission.

In keeping with the parties' intention, Article 7.9 of the Agreement and Plan of reorganization between Kern and Tenneco, provided that the closing shall take place in San Francisco, California "on such date not earlier than September 30, 1967 and not later than December 31, 1967 as the parties shall fix by mutual consent or at such other time or at such other place as the parties may agree upon."

This would have permitted until at least September 30, 1967 to obtain a favorable ruling from the Securities and Exchange Commission without its having to be retroactive and would even permit a closing on December 9 if such ruling was not obtained. Undoubtedly the "other time" provision was appropriate in view of the fact that unforeseen circumstances may delay closing of the plan beyond the expectation of the parties at the time. It was not the intention of the parties to close prior to September 30, 1967, and the Proxy Statement expressly states the intention of the parties to close between that date and December

31, 1967.* The key date, if the favorable ruling from the Securities and Exchange Commission was not obtained earlier, was intended to be December 9, 1967, as that was six months after the latest date on which Occidental purchased any Kern shares pursuant to public tender.

The Agreement and Plan of Reorganization, Article 6.3, further provided that if the closing takes place on or before December 1, 1967, the new Tenneco preference stock would be listed no later than December 31, 1967, but if the closing is later than December 1, 1967, the listing will be no later than thirty (30) days after the closing date. This was in order to permit Tenneco and Kern to carry out an agreement with Occidental that the Tenneco preference stock issued on the merger would not be registered prior to the exercise or expiration of the option from Occidental to Tenneco Corporation.

In recognition of the parties' agreement, the California Commission of Corporations required Kern to send a letter to its shareholders advising them that it was the intention of Tenneco not to list the new preference stock until sometime in December of 1967. A copy of such letter of Kern to its shareholders dated August 18, 1967 is annexed hereto as Exhibit 4.

V

In reliance on Tenneco and Kern's aforesaid agreement and understanding, Occidental agreed to:

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* As stated by Kern at page 4 of its Proxy Statement to its shareholders dated June 16, 1967:

> "If the shareholders of KCL and Tenneco take favorable action at their meetings to be held, respectively, on July 17, 1967 and July 11, 1967, it is expected that the sale of assets will be consummated *on a date to be agreed upon during the period from September 30 to December 31, 1967.*" (Emphasis supplied.)

Exhibit A, Annexed to Foregoing Affidavit

(1) Dismiss the pending California action against Kern. This is confirmed by the letter of June 16, 1967 from Pillsbury, Madison and Sutro (who negotiated the agreement on behalf of Occidental with counsel for Tenneco) to Morrison, Folster, Holloway, Clinton & Clark (who were handling the suit on behalf of Occidental to obtain certain records and stockholders' lists from Kern) advising them that, on the basis of the aforesaid agreement, they should take steps to dismiss the pending action. Carbon copies of this letter were sent to counsel for Tenneco and to your deponent. A copy of said letter is annexed hereto as Exhibit 5.

(2) Execute in favor of Tenneco's wholly owned subsidiary an option to purchase Tenneco preference stock which Occidental would receive when, as and if the Kern-Tenneco plan was closed. This is confirmed by the Option Agreement annexed hereto as Exhibit 3A.

(3) Address a letter to Kern setting forth its reasons as to why it had elected not to vote its shares at the forthcoming shareholders' meeting to be held on July 17, 1967 with regard to said plan. This is confirmed by Occidental's letter to Kern dated July 14, 1967, a copy of which is annexed hereto as Exhibit 6, and by Occidental's correction letter to Kern dated July 25, 1967, a copy of which is annexed hereto as Exhibit 7.

On July 17, 1967, a majority of the shareholders with full knowledge of Occidental's Option Agreement with Tenneco's wholly-owned subsidiary and its terms approved the Kern-Tenneco Merger Plan. Occidental, however, abstained from casting any vote in favor of the merger, which, your deponent is advised, was tantamount to a negative vote under California law. Prior thereto, on July 11, 1967, a majority of the shareholders of Tenneco had likewise approved the merger plan.

Exhibit A, Annexed to Foregoing Affidavit

After their respective shareholders had approved their merger, Kern and Tenneco, in violation of their agreement and understanding with Occidental and in violation of their representation to their shareholders in the Proxy Statements, agreed to close, and did close the transaction in question on August 30, 1967, all for the purpose of creating a colorable claim in their favor against Occidental under Section 16(b) of the Securities Exchange Act of 1934. This is the very claim asserted by plaintiff in his first count and involved in the present application by plaintiff for partial summary judgment.

Apart from the fact that section 16(b) of the Act was never intended to apply to the facts at bar, elementary principles of equity and fair play preclude plaintiff from asserting any claim for relief on the basis of his own default and breach of contract. For the purpose of this motion, your deponent is advised that plaintiff stands in the shoes of his corporation Kern and therefore is subject to any defense Occidental may have against said corporation.

By reason of the foregoing, it is respectfully requested that plaintiff's motion for partial summary judgment be denied in all respects.

ARMAND HAMMER

(Sworn to March 5, 1968.)

Exhibit A, Annexed to Foregoing Affidavit

(EXHIBIT 1)

KERN COUNTY LAND COMPANY
600 California Street
San Francisco, California

May 10, 1967

Dear Fellow Share Owner:

As you undoubtedly know, Kern County Land Company is currently the object of a raid, an obvious and transparent scheme aimed at control of your company. Newspapers of Monday, May 8, carried the story that Occidental Petroleum Corporation was making an offer to you and our other Share Owners for 500,000 or more shares of Kern County Land Company stock.

Occidental's move came with no preliminary notice to our management. Our first knowledge of the attack was a telephone call Sunday afternoon, May 7, from Armand Hammer, president of Occidental. He did not reveal the terms of his offer. He was urged then to present any ideas he might have that would benefit KCL Share Owners before making the tender offer; we have always been eager to explore ideas profitable to the Company. Instead he went ahead with the announcement and we could assume only that he had no confidence in his ability to convince our management and Board of Directors that a merger between KCL and Occidental would be in your interest.

After his scheme was made public, May 8, he visited our office to discuss the tender offer.

At noon, May 8, a special meeting of the Kern County Land Company Board of Directors met to explore every facet of the situation. Our most urgent recommendation was and is that you do NOT tender your shares, that we use every legitimate means to frustrate Hammer's ambition to take over your Company.

Exhibit A, Annexed to Foregoing Affidavit

We fully realize how tempting his offer may seem. Your most obvious reason for refusing to tender your shares, however, is simply the fact that you can do better.

It is obvious that Hammer wants control of Kern County Land Company. It is obvious he cannot control your Company with 500,000 shares. It is obvious that further offers must be made and the price certainly would not be less.

This, of course, is obvious to Hammer and may explain his choice of method—a cash offer seeking to panic our Share Owners into hasty action by putting it on a "first come, first served" basis, a method frowned upon by the New York Stock Exchange.

It should be equally obvious to the thoughtful investor that Kern County Land Company has others than the opportunist at Occidental interested in mergers. We have in hand at this time a number of offers from strong and reputable corporations to discuss merger possibilities—mergers that could result in tax-free exchanges of stock rather than the taxable Hammer scheme—and your Board of Directors has been giving full consideration to such opportunities.

We remind you that once your shares are tendered, you cannot withdraw them. They will be frozen at that price until the expiration of the offer, whenever that may be. We earnestly recommend that you resist being routed into precipitate action by Hammer's tactics.

We have other sound reasons for fighting this power grab.

As we have explained forthrightly in our reports to you, our efforts over the past years have been to work in your longer term interests through broadening our operations while at the same time increasing current earnings. Obviously, current earnings had to be penalized to some extent to pay for diversification, as we have been careful

to point out, and we have followed our carefully planned program with your approval.

This program, designed to end our dependence on oil royalties that must someday be depleted and put the company more in step with our growing economy, has included a number of major changes. You are familiar with them.

Even with all this building for the future, with the burden on earnings, our per-share earnings have increased steadily to $5.25 per share last year.

Briefly, that is the position today. With your support, we have invested heavily in the future and have now reached the point where the company and its share owners can reap the benefits.

Armand Hammer, it must be admitted, has evaluated the Company better than have most outsiders. He fully appreciates the fact that our 1.8 million acres of land are carried on our books at a fraction of their market value and that no discovery value is assigned the oil reserves underlying our California lands. Obviously he, too, sees the growth ahead that we expect for KCL. Obviously he agrees with us that the real value of a share of KCL stock greatly exceeds $83.50 or he would not offer that amount. Indeed, his offer is $85 per share, including the extraordinary and enticing $1.50 per-share bonus to brokers that he seems to think necessary to implement his scheme.

Over the past 15 years, the foundation has been laid for the growth we believe we can enjoy now. We do not wish to see this taken away from the share owners who have paid for it. We do not want to see this carefully planned program of growth go for nought.

We have tremendous faith in the abilities of the splendid team of employees we have assembled in our program of change and growth. We believe Kern County Land Company shares will be worth more in five years as Kern County Land Company shares than they will be worth as shares of a company raided by Occidental.

Exhibit A, Annexed to Foregoing Affidavit

We believe completely that a takeover by Hammer and Occidental would not be in the best interests of KCL and its Share Owners. We believe completely that your interests will be better served if you retain your shares in KCL and participate in the growth made possible by our years of careful preparation.

Sincerely,

Dwight M. Cochran
DWIGHT M. COCHRAN
President

Geo. G. Montgomery
GEO. G. MONTGOMERY
Chairman of the Board

(EXHIBIT 1A)

TELEGRAM

MAY 11, 1967

THE ANNOUNCEMENT TODAY BY HAMMER OF OCCIDENTAL THAT HE IS EXTENDING HIS OFFER CONFIRMS OUR ADVICE TO YOU THAT HIS GRAB FOR YOUR SHARES IS A RAID, AN EFFORT TO SEIZE CONTROL OF KERN COUNTY LAND COMPANY. LET ME REPEAT; YOU MUST NOT BE STAMPEDED BY HAMMER INTO HASTY ACTION. THERE IS NO SOUND REASON WHY YOU SHOULD SELL NOW. I URGE YOU TO GIVE MOST THOUGHTFUL CONSIDERATION TO THE LETTER WE HAVE SENT TO YOU. DO NOT TENDER YOUR SHARES IN KCL.

DWIGHT M. COCHRAN, PRESIDENT KERN COUNTY LAND COMPANY

Exhibit A, Annexed to Foregoing Affidavit

(EXHIBIT 2)

KERN COUNTY LAND COMPANY
600 California Street
San Francisco, California 94108

May 15, 1967

To Our Share Owners:

Since we last wrote to you, a number of additional companies have indicated interest in possible merger with our Company.

Talks are under way with selected companies, but for obvious reasons we cannot at this time reveal the name of any corporation under consideration. However, we want you to know that discussions are being actively pursued and that representatives of Morgan Stanley & Co. and White, Weld & Co., leading investment bankers, are assisting us in our negotiations and evaluating proposals made to us.

KCL is adamant in its position that control by Occidental would be detrimental to our Share Owners. The fact that discussions with other companies are being held would not normally be publicized, but Occidental has sought to panic our Share Owners into hasty action with a "first-come—first-served" tender offer.

So we want you to know that we are working toward arrangements that should be far more beneficial to your interests than the Occidental tender offer.

We will continue to keep you informed of developments of interest.

Sincerely,

Dwight M. Cochran
DWIGHT M. COCHRAN
President

Geo. G. Montgomery
GEO. G. MONTGOMERY
Chairman of the Board

Exhibit A, Annexed to Foregoing Affidavit

(EXHIBIT 3)

From:

KERN COUNTY LAND COMPANY
600 California Street
San Francisco 8, California
EXbrook 7-4100
(Robert W. Jackson)

FOR IMMEDIATE RELEASE

San Francisco, May 19, 1967—The Board of Directors of Kern County Land Company voted today to accept an offer of Tenneco Inc., subject to the approval of the share owners of both companies, President Dwight M. Cochran announced.

Tenneco, Cochran explained, will offer one share of a new convertible preference stock for each share of Kern County Land Company stock. The new stock will have one vote per share, a cumulative dividend of $5.50 per share and a liquidation value of $100, he pointed out. Each share will be convertible after July 1, 1969, into 3.6 shares of Tenneco common stock and will be non-callable for 10 years. It will then be callable at $110, declining $1 per year to $100. The transaction will be accomplished on a tax-free basis to KCL share owners.

"In the opinion of our Board of Directors, supported by the financial advice of Morgan Stanley & Co., this is an excellent offer and its acceptance is in the best interests of our share owners," Cochran said. "The Board of Directors recommends its acceptance and has called a meeting of share owners for July 17.

"The Board considered all proposals the company had received, one of which was from Occidental Petroleum Corporation, which is currently seeking KCL shares through a tender offer," Cochran said. "Directors at the

meeting voted unanimously in favor of the offer made by Tenneco."

Tenneco Inc., of Houston, Texas, a major diversified natural resource-oriented company, in 1966 had assets of nearly $3 billion and earned $108 million on sales of $1.16 billion. Tenneco's operations include oil, chemicals, packaging and natural gas transportation.

KCL revealed last week that it was considering proposals from other companies and urged its share owners not to tender their shares to Occidental. "The most obvious reason," Cochran and Board Chairman, George G. Montgomery said in a special letter May 10, "is simply the fact that you can do better."

"The Tenneco offer," Cochran declared today, "certainly bears out our earlier advice to our share owners."

(EXHIBIT 3A)

OPTION AGREEMENT

THIS AGREEMENT made in Jersey City, New Jersey, this 2nd day of June, 1967 between Tenneco Corporation, a Delaware corporation (hereinafter called "Tenneco"), and Occidental Petroleum Corporation, a California corporation (hereinafter called "Occidental"),

WITNESSETH:

WHEREAS, Occidental is, as of the date hereof, the beneficial owner of 886,623 shares of the common stock, of the par value of $2.50 per share, of Kern County Land Company, a California corporation (hereinafter called "Kern County");

Exhibit A, Annexed to Foregoing Affidavit

WHEREAS, it is proposed to enter into an agreement and Plan of Reorganization (hereafter called the "Plan") whereby a wholly-owned subsidiary of Tenneco Inc., a Delaware corporation (hereinafter called "Tenneco Inc."), will purchase all of the assets of Kern County and under which shareholders of Kern County will receive shares of $5.50 Cumulative Convertible Preference Stock, without par value (hereinafter called the "Convertible Preference Stock") of Tenneco Inc. upon the liquidation of Kern County, subject to the due approval by the stockholders of Tenneco Inc. to the authorization and issuance of the Convertible Preference Stock, and the Board of Directors of Kern County have agreed to such proposal, subject to the due approval of the shareholders of Kern County;

WHEREAS, Tenneco is desirous of obtaining an option to purchase, when and if issued, the shares of the Convertible Preference Stock of Tenneco Inc. to be received by Occidental upon the liquidation of Kern County pursuant to the Plan;

NOW, THEREFORE, in consideration of the covenants herein contained, Tenneco and Occidental hereby agree as follows:

1. Occidental hereby covenants, warrants and agrees that it owns beneficially, and has good and valid title to, 886,623 shares of capital stock, of the par value of $2.50 per share, of Kern County free and clear of all liens, encumbrances and equities of others;

2. Tenneco agrees to pay to Occidental the sum of $8,866,230 for the option granted under this Option Agreement; payment of $886,623 has been made contemporaneously with the execution of this Option Agreement and payment of the balance thereof is to

be made by certified check in New York funds within five business days following the date hereof;

3. Occidental hereby grants to Tenneco an option to purchase, when and if issued, all of the shares of Convertible Preference Stock of Tenneco Inc. to be received by Occidental with respect to the 886,623 shares of capital stock of Kern County owned by Occidental in connection with the liquidation of Kern County at an aggregate price of $93,095,415 which price shall include the amount of $8,866,230 which Tenneco is paying for this option and shall be reduced by such amount;

4. Tenneco may exercise this option at any time after December 9, 1967 and (i) if the closing date of the sale of assets pursuant to the Plan occurs prior to December 10, 1967, then said option shall expire on December 31, 1967, or (ii) if said closing date occurs on or after December 10, 1967 and prior to July 1, 1968, then said option shall expire on the thirtieth day after said closing date. This option shall be exercised by Tenneco by giving written notice to Occidental stating when delivery of the Convertible Preference Stock of Tenneco Inc. and payment of the aggregate amount to be paid to Occidental under Paragraph 3 hereof is to be made. In any event such payment shall be made by certified check within not less than three days or more than sixty days of the date on which Tenneco Inc. gives notice of its intention to exercise the option;

5. Upon the exercise of the option granted hereby, Occidental shall at the time of payment fixed in the notice referred to in Paragraph 4 transfer to Tenneco certificates for all of the shares of the Convertible Preference Stock of Tenneco Inc. covered by

this Option Agreement which Occidental covenants, warrants and agrees shall be free and clear of all liens, encumbrances, and equities of others. The delivery of such shares of Convertible Preference Stock shall be made against payment therefor at the office of Wells Fargo Bank, 464 California Street, San Francisco, California;

6. It is contemplated by the parties hereto that Occidental will receive with respect to the Kern County stock owned by Occidental and to the Tenneco Inc. Convertible Preference Stock which is the subject matter of this Option Agreement, dividends with respect to the third and fourth quarters of 1967 and pro-rata with respect to each quarter, if any, in 1968 in which it shall be the record owner of such stock;

7. In the event that the closing of the sale of assets contemplated by the Plan has not occurred prior to July 31, 1968 then the option granted hereby shall terminate and Occidental shall within five business days thereafter repay to Tenneco by certified check in New York funds, the amount which Tenneco has paid to Occidental under Paragraph 2 of this Option Agreement;

8. This Option Agreement and the rights of Tenneco hereunder shall be transferable by Tenneco but this Option Agreement and the shares of capital stock of Kern County referred to herein shall not be otherwise transferable except to a wholly-owned subsidiary of Occidental. In the event that because of the transfer or sale by Tenneco of the option granted hereunder and the subsequent sale of the Convertible Preference Stock, it is necessary that a registration statement under the Securities Act of 1933 become

effective with respect to such Convertible Preference Stock and Occidental is deemed to be an underwriter with respect to such stock, Tenneco agrees to indemnify and hold Occidental harmless from any liability arising to Occidental because of being deemed an underwriter with respect to such stock; such indemnity agreement is to be in substantially the same form as the indemnity given by Tenneco Inc. to the underwriters in the last public offering of Tenneco Inc. securities;

9. Occidental agrees that it will mark the certificates for 886,623 shares of Kern County capital stock owned by it to reflect appropriately the existence of this Option Agreement;

10. All notices and other communications under this agreement shall be sent to the parties as follows:

Tenneco	*Occidental*
C. B. Nourse, President Tenneco Corporation Wilmington, Delaware	D. L. Commons, Vice President Occidental Petroleum Corporation 10889 Wilshire Boulevard Los Angeles, California 90024

11. This agreement shall be construed in accordance with the laws of the State of New York;

12. This agreement constitutes the entire agreement between the parties hereto and may not be amended except in writing.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year

first above written, each intending to be legally bound hereby.

OCCIDENTAL PETROLEUM CORPORATION

By W. R. DAVIS
Executive Vice President

TENNECO CORPORATION

By GARDINER SYMONDS
Chairman of the Board

(EXHIBIT 4)

KERN COUNTY LAND COMPANY
600 California Street
San Francisco, California 94108

August 18, 1967

TO OUR SHARE OWNERS:

On July 21, 1967, following the Special Meeting at which you voted overwhelmingly in favor of the proposal to combine Kern County Land Company with Tennecco Inc. we briefly reported to you on the results of that meeting and said that we would advise you concerning the ultimate closing of the transaction. The purpose of this letter is to bring you up-to-date with respect to developments since our last letter.

As you will recall the proxy material stated it was expected that the transaction would be completed between September 30 and December 31, 1967. The Agreement, a copy of which was included as a part of the proxy state-

ment, provides that the parties may agree to a closing at an earlier or later date. The matter has moved rapidly, and we feel it in the best interest of our Company and our Share Owners to close the transaction at the earliest possible date. We and Tenneco have agreed that it will be consummated as soon as remaining legal obstacles have been removed, hopefully before September 30th.

You have undoubtedly noted newspaper reports of certain legal actions brought against the Company, which have interfered with our efforts. One suit was brought in Midland, Texas to enjoin the transaction. Just yesterday Judge Perry D. Pickett of the Midland District Court rejected the motion of the three plaintiffs for an injunction. Thus the Midland case no longer stands in the way of closing the transaction. These same Midland plaintiffs have now brought a damage suit in the Federal Court in San Franciso against most of the same defendants, and on substantially the same grounds. We feel that this case is equally without merit, and will be satisfactorily resolved.

There have been two other actions which name your Company as an additional defendant, but which do not affect the closing.

With respect to dividends: Your Board of Directors has declared the Company's regular quarterly dividend of 65¢ per share for the third calendar quarter. It will be paid on September 21 to Share Owners of record August 14. If the Tenneco transaction is consummated at any time during 1967 you will receive your full $1.37½ dividend on your Tenneco Preference stock for the fourth quarter.

As stated in the proxy material, Tenneco is obligated to cause the Tenneco Preference Stock to be listed on the New York and Pacific Coast Stock Exchanges by December 31st if the closing occurs by December 1st. Tenneco has advised us that it does not presently intend to effect such listing until sometime in December.

Exhibit A, Annexed to Foregoing Affidavit

After the closing you will be advised concerning the procedure for the exchange of your KCL shares for the new Tenneco $5.50 Cumulative Preference Stock.

Sincerely,

DWIGHT M. COCHRAN	GEO. G. MONTGOMERY
Dwight M. Cochran	Geo. G. Montgomery
President	*Chairman of the Board*

(EXHIBIT 5)

Law Offices of
PILLSBURY, MADISON & SUTRO
Standard Oil Building
225 Bush Street
San Francisco, California 94104

Telephone 421-0133
Area Code 419

June 16, 1967

By Hand

Richard J. Archer, Esq.
Messrs. Morrison, Foerster, Holloway,
Clinton & Clark
120 Montgomery Street
San Francisco, California 94104

Dear Dick:

I have been advised by F. Arnold Daum, Esq., counsel for Tenneco Inc., that the Agreement and Plan of Reor-

ganization between Tenneco and Kern County Land Company provides that Tenneco has until December 31, 1967, to list the Preference shares being delivered to KCL. The agreement further provides that in the event the sale of assets does not occur prior to December 1, 1967, Tenneco has 30 days following the sale of assets to effect the listing.

While the foregoing provision does not obligate Tenneco Inc. to delay listing until the option granted by Occidental Petroleum Corporation has been exercised or expired, Mr. Daum advised me, and indicated that he had assured Al Brown, that the listing would not be effected until after the option is exercised or expires. Mr. Daum also advised me that his client was aware of and had agreed to the assurances given by Mr. Daum.

On the basis of the foregoing, you should take prompt steps to cause the various actions brought by Occidental Petroleum Corporation against Kern County Land Company to be dismissed.

Very truly yours,

(Signed) Bruce
BRUCE ALAN MANN

cc: F. Arnold Daum, Esq.
Dr. Armand Hammer

Exhibit A, Annexed to Foregoing Affidavit

(EXHIBIT 6)

OCCIDENTAL PETROLEUM CORPORATION
10889 Wilshire Boulevard, Suite 1500
Los Angeles, California 90024

879-1700—477-8521

July 14, 1967

Kern County Land Company
600 California Street
San Francisco, California 94108

Dear Sirs:

This letter is written to explain our position with respect to the consummation of the sale of assets of Kern County Land Company to a subsidiary of Tenneco Inc.

At the time of the announcement of the proposed KCL-Tenneco transaction, we were greatly disappointed that we had been unable to arrive at some common ground with KCL looking to a joining of KCL with Occidental. Accordingly, because of this and because of our substantial investment in KCL, our first reaction was to attempt to find out if our investment was in jeopardy and further to see whether a better proposal could be obtained by KCL for the benefit of its shareholders. On the basis of our examination of material concerning KCL available to the public, we concluded that Occidental could not offer KCL a more attractive proposal than that made by Tenneco. It also became apparent that we were going to become engaged in arduous, lengthy and expensive litigation if we attempted to obtain information concerning the value of KCL's assets which was not available to other KCL shareholders. Since Occidental had no more desirable offer to make to the KCL shareholders, it was clear that even if Occidental waged a costly and bitter proxy fight, it was unlikely that the KCL-Tenneco transaction could be stopped. Under the

circumstances, Occidental did not consider it to be in its best interest, or the best interest of its shareholders, or the best interest of KCL shareholders generally for it to approve the transaction. Accordingly, prior to the time that the Option Agreement was entered into between Tenneco Corporation and us, we had decided that we would not oppose the transaction.

In view of the fact that we would rather have worked out our own transaction with KCL, we shall not vote our KCL shares at the KCL Shareholder's Meeting on July 17, 1967.

This does not mean that we view the transaction as unfair or inequitable to a KCL shareholder. Viewed solely in this light, we can say that if the form of the transaction were one in which we had a right of appraisal, we would not seek such rights but would vote in favor of the sale of assets. We believe that ultimately the Tenneco Preference Stock that KCL is to receive will be worth more than the $105 per share option price agreed upon between Occidental and Tenneco Corporation.

We should also make it clear that while we will not oppose KCL's sale of assets to Tenneco, we do not know at this time whether we will want to oppose the dissolution of KCL after such sale.

We hope the foregoing explains our failure to vote at KCL Shareholder's Meeting on July 17th.

Yours very truly,

OCCIDENTAL PETROLEUM CORPORATION

By .....
W. R. DAVIS
Executive Vice President

(July 28, 1967—read via telephone by
Mr. Bruce Mann's Secretary)

Exhibit A, Annexed to Foregoing Affidavit

(EXHIBIT 7)

Kern County Land Company
600 California Street
San Francisco, California 94108

July 25, 1967

Dear Sirs:

Please refer to our letter to you dated July 14, 1967. Inadvertently the next to the last sentence of the second paragraph of the letter contained an error. In such sentence obviously the word "approved" should be "opposed". This letter is written for the purpose of making such correction. The sentence in question should read "Under the circumstances, Occidental would not consider it to be in its best interest, or the best interest of its shareholders, or the best interest of KCL Shareholders generally for it to oppose the transaction."

Very truly yours,

OCCIDENTAL PETROLEUM CORPORATION

By .....
W. R. DAVIS,
Executive Vice President

WRD:dp

Exhibit B, Annexed to Foregoing Affidavit

(Affidavit of Simon Rose and Exhibits Attached, Read in Opposition to Plaintiff's Motion in Mukamal Action)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

State of New York }
County of New York } ss.:

Simon Rose, being duly sworn, deposes and says:

I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for the defendant Occidental Petroleum Corporation ("Occidental"), and am fully familiar with all the facts and proceedings heretofore had herein. I respectfully submit this affidavit in opposition to plaintiff's motion for partial summary judgment addressed to the first count of the complaint for the reasons noted herein.

I

Nature of the First Count

The complaint as filed alleges four separate causes of action, three of which are not involved in the present application. As indicated above, plaintiff's motion relates solely to the first count which purports to set forth a claim against defendant Occidental and the other defendants Tenneco, Inc. ("Tenneco"), KCL Corporation ("KCL") and Kern County Land Company ("Kern") under Section 16(b) of the Securities Exchange Act of 1934 on behalf of Kern and

its former stockholders to recover "short-swing" profits allegedly realized by Occidental. Section 16(b), in pertinent part, provides that:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship, to the issuer, any profit realized by him from any purchase and sale, or any sale or purchase, of any equity security of such issuer * * * within any period of less than six months, * * * shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months."

and that a:

> "Suit to recover such profit may be instituted at law or in equity in any Court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such project was realized."

subject, however, to the proviso that:

> "This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale or purchase, of the security involved, * * *." *

---

* For the purpose of this motion, Section 16(a) of the same 1934 Act defines "beneficial owner" as a person who owns directly or indirectly more than ten (10) percent of any class of any equity securities registered on a national securities exchange.

Exhibit B, Annexed to Foregoing Affidavit

According to plaintiff, between May 8 and June 8, 1967, defendant Occidental became the beneficial owner of more than ten (10) percent of the outstanding capital stock of Kern which was listed and traded on the New York Stock Exchange and the Pacific Coast Stock Exchange through a public tender offer made directly by it to Kern's stockholders to purchase 1,000,000 shares of Kern's stock, and that within six months thereafter Occidental sold the same shares at a substantial profit to itself, which assertion is denied by Occidental in its answer.*

It is undisputed that as of June 1, 1967, an Agreement and Plan of Reorganization was entered into between Kern, Tenneco and the latter's wholly owned subsidiary, KCL, which provided for the transfer of all Kern's assets to KCL in exchange for $5.50 Cumulative Convertible Preference Stock of Tenneco, on the basis of one share of Tenneco Preference Stock for each share of Kern Capital Stock, outstanding, the dissolution and liquidation of Kern and the distribution to Kern stockholders of said Tenneco Preference Stock on the basis of one share of Tenneco Preference Stock for each share of Kern Capital Stock, and that on the very day of said Agreement and Plan of Reorganization was executed by the parties, Occidental was the beneficial owner of more than ten (10) percent of the outstanding capital stock of Kern.

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* In addition to said denials, defendant's answer also sets forth a number of defenses completely dispositive of plaintiff's aforesaid claim, including the defense previously asserted by defendants Tenneco and KCL in their answer that neither the plaintiff nor the corporation which it represents has any standing to raise the instant claim. All of these defenses will be discussed in greater detail later on in this affidavit. Also, defendant's answer asserts various cross-claims against the other corporate defendants, including the very corporation represented by plaintiff herein, in amounts exceeding plaintiff's claim under the first count. Under well settled principles, this factor alone is sufficient to defeat plaintiff's motion for partial summary judgment.

Exhibit B, Annexed to Foregoing Affidavit

It is equally undisputed that the aforesaid Agreement and Plan of Reorganization was approved by a majority of the stockholders of Tenneco on July 11, 1967 and by a majority of the Kern shareholders *exclusive* of Occidental on July 17, 1967, and that on August 30, 1967 Kern had transferred all its assets to KCL in exchange for the Tenneco Preference Stock and had filed a certificate of dissolution with the California Secretary of State. Nor is there any dispute that on August 31, 1967 Kern had advised its shareholders that the aforesaid Agreement and Plan of Reorganization had been consummated and that they were entitled to receive upon surrender of their Kern Certificates, certificates for Tenneco Preference Stock at the rate of one share of Tenneco Preference Stock for each share of Kern stock.

What is in dispute, however, are the conclusions improperly drawn by plaintiff from these facts. *First*, plaintiff contends that Occidental is deemed to have "sold" its Kern shares within the meaning of Section 16(b) of the 1934 Act on August 30, 1967, which was the day the above merger or reorganization was completed, since on that date Occidental allegedly "had a clear, unfettered and unqualified right to exchange" its Kern shares for the new Tenneco Preference Stock in accordance with the terms of the merger agreement, *notwithstanding the fact*:

> (1) That Kern had sought the aid of, and accepted the merger proposal of Tenneco on the very day it was made, for the purpose of preventing Occidental from acquiring control of the Kern management through public acquisition of Kern's shares;
>
> (2) That Occidental had not voted in favor of the Kern-Tenneco merger plan, but instead had abstained from casting any vote, which under California law was tantamount to a negative vote;

Exhibit B, Annexed to Foregoing Affidavit

(3) That Kern, Tenneco and KCL had consummated the aforesaid Agreement and Plan of Reorganization in violation of, and with full knowledge of, the restraining order issued by the District Court of Knox County, Texas, for the 50th Judicial District on August 21, 1967 prohibiting such closing, for the purpose of creating a colorable 16(b) claim in their favor against Occidental; *

(4) That Kern and Tenneco had agreed to, and did close on, August 30, 1967 in violation of their agreement and understanding with Occidental, upon which Occidental had relied in dismissing its pending action against Kern in California, in not undertaking any proxy fight for the purpose of preventing stockholders' approval of the Kern-Tenneco Plan, and in executing an option in favor of Tenneco Corporation for the sale of all its Tenneco Preference Stock which Occidental would receive upon consummation of the aforesaid Agreement and Plan of Reorganization in exchange for its Kern shares; and

(5) That at the time of the closing there was no firm contract or agreement in existence between Occidental and Kern or Tenneco relating to the sale or disposition of the Kern shares other than the option granted to Tenneco Corporation which was unenforceable for 16(b) purposes until exercised by Tenneco Corporation.

Next, plaintiff insists that Occidental's alleged "sale" of Kern stock on August 30, 1967 may be matched up for 16(b) purposes with prior public acquisition of Kern stock

* This is confirmed by the very instrument of assignment delivered by Kern to KCL on the closing, a copy of which is annexed as Exhibit F to the Supporting affidavit of Tenneco's Vice President and Associate General Counsel.

by Occidental as beneficial owner * within six months before said closing date, *in spite of the fact*:

(1) That Occidental, as conceded by Kern in its letter to plaintiff and to its other stockholders dated May 10, 1967 (Exhibit 1, Hammer's Affidavit), was an "outsider" at the time it announced its public tender offer to Kern stockholders on May 8, 1967 to acquire up to 500,000 shares of its stock;

(2) That Occidental had acted openly, fairly and without any inside information whatsoever with regard to the Tenneco merger proposal in extending its public tender offer on May 11, 1967 to cover an additional 500,000 shares of Kern stock;**

(3) That Occidental had already acquired pursuant to public tender the beneficial ownership of 883,331 of the 884,873 shares of Kern stock involved in this action prior to the date Kern's Board of Directors announced its acceptance of the Tenneco proposal on May 19, 1967;

(4) That Occidental, upon learning of the Tenneco proposal and its acceptance by Kern directors,

---

* As shown in the opposing affidavit of Armand Hammer, Occidental became a beneficial owner of more than ten (10) percent of Kern's outstanding stock on May 10, 1967, 2:46 P.M., and that prior thereto Occidental had received tenders aggregating 433,053 shares of Kern stock. It appears that on May 10, 1967, 2:46 P.M., tenders for 2,500 additional shares of Kern's stock was received.

** As a matter of fact, according to the Business Week article referred to by Armand Hammer at page 13 of his opposing affidavit, Kern contacted Tenneco for aid and assistance against Occidental for the first time on the very day Occidental extended its public offer for additional shares of Kern stock.

made no further public offer or attempt to acquire any additional Kern stock;*

(5) That Occidental was neither a director nor officer of Kern and Tenneco, nor controlled directly or indirectly the directors and management of either company at the time the merger proposed was offered by Tenneco and accepted by Kern; and

(6) That Occidental played no part whatsoever in any of the negotiations or discussions relating to such merger proposal, which was forced upon Occidental against its will in order to prevent said defendant from acquiring control of Kern.

Contrariwise, defendant Occidental takes the position that Section 16(b) of the 1934 Act was never intended to apply to the surrender of one stock for the stock of another issuer pursuant to a merger or corporate reorganization where the beneficial owner of the surrendered stock had acquired such by reason of a public offer under conditions excluding the possibility of any abuse of inside information,** particularly where, as here, the merger or corporate reorganization was approved by the necessary majority of shareholders *exclusive* of the beneficial owner for the purpose of preventing said beneficial owner from acquiring control over the management of said corporation by public acquisition.

---

* In view of the terms of its outstanding public offer, Occidental had no alternative but to purchase the 3,376 shares of Kern stock tendered to its receiving agents subsequent to Kern's announcement of its acceptance of the Tenneco offer.

** The very purpose of a public invitation for tenders is to apprise both the management and the owners of securities of your intention and plan to acquire such securities. Instead of having to guess what is causing a change in the market price of the securities, the security owners know all the facts since the plan is publicly announced and everyone has the opportunity to have this knowledge at the same time.

Indeed, to hold otherwise, would make legitimate public tender offers practically impossible. Large sums must be invested, the usual market risks taken, and if a merger consummated by some other person within six (6) months of the public tender resulted in a paper profit windfall payment under Section 16(b) to such other person, a responsible company would seldom be willing to take on this additional risk.

II

As shown by the answer of defendants Tenneco and KCL filed herein, neither the plaintiff nor the corporation which he represents has any standing to make any claim against Occidental under the first count. Contrary to what plaintiff seems to suggest, this issue may not be reserved for later determination.

On July 17, 1967, the necessary majority of Kern's shareholders (exclusive of Occidental), approved the above Agreement and Plan of Reorganization dated as of June 1, 1967, a copy of which is annexed as Exhibit H to the moving papers. Article 7.1 of said Agreement states that:

> "Except for the sum of money to be reserved by Kern for winding up its affairs and distributing the shares of Tenneco $5.50 Cumulative Convertible Preference Stock to the shareholders of Kern, Kern hereby agrees to convey, transfer, assign and deliver to KCL and KCL agrees to acquire and accept from Kern, as herein provided, on the Closing Date all of the assets and properties, business and goodwill of Kern of every kind and description, whether or not described in Article I of this Agreement and Plan of Reorganization or any schedule therein referred to or any schedule delivered in substitution for any thereof, including without limitation all

properties, tangible or intangible, real, personal or mixed, accounts receivable, bank accounts, *choses in action, claims*, cash and all securities * * *, all as the same shall exist at Closing Date." (Emphasis supplied)

Article 7.3 of the same Agreement, in pertinent part, also provided that:

"Kern also agrees that it will convey, transfer, assign and deliver to KCL all properties, *claims, choses in action,* rights and other assets which Kern may acquire *or to which it may become entitled on or after the Closing Date* other than the shares of Tenneco $5.50 Cumulative Convertible Preference Stock to be delivered to Kern pursuant to this Agreement and Plan of Reorganization." (Emphasis supplied)

According to defendants Tenneco and KCL, Kern was obligated under Articles 7.1 and 7.3 to transfer to KCL all claims, choses in action, including 16(b) liability claims against Occidental, rights and other assets which Kern may acquire or to which it might become entitled whether before, on or after the closing date, other than the shares of the Tenneco Preference Stock delivered to Kern under said Plan.

On the basis of the foregoing assignment, KCL, on October 17, 1967, commenced a similar action in this Court as assignee against defendant Occidental seeking the same relief sought by plaintiff in the instant action under the first count.* A copy of the KCL complaint is annexed as Exhibit B to the moving papers.

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* According to plaintiff, the event subjecting Occidental to 16(b) liability occurred on August 30, 1967, which was more than a month subsequent to plaintiff's alleged demand upon Kern to take action against Occidental under 16(b) of the 1934 Act.

Exhibit B, Annexed to Foregoing Affidavit

Thereafter, in the case at bar, defendants Tenneco and KCL filed a joint answer wherein it was asserted by way of affirmative defense that:

> "To the extent that the complaint purports to state a claim for relief on behalf of Kern or the former stockholders of Kern, said action is barred by reason of the fact that on or about August 30, 1967 all of Kern's assets and choses in action were assigned to defendant KCL Corporation * * *."*

Thus the first question this Court must resolve prior to any determination of the merits, is whether or not the assignment quoted above also embraced Kern's alleged 16(b) claim against Occidental in this action. If so, then the first count should be dismissed because of plaintiff's lack of standing to sue on behalf of KCL. If not, then Occidental is entitled to an order dismissing the later action brought against it in this Court by KCL as assignee.**

On the other hand, should it appear that this question presents factual issues which cannot be resolved on this application, then, of course, plaintiff's motion for partial summary judgment should be denied without prejudice pending a later determination of the standing question.***

---

* See also Occidental's answer filed herein incorporating by reference said affirmative defense to plaintiff's first cause of action.

** There is now pending before this Court a motion by Occidental to consolidate these two cases as well as two other similar cases into one for all purposes, which if granted would give this Court jurisdiction over all of these cases insofar as the present application is concerned.

*** In view of the clear language of the assignment delivered by Kern to KCL on August 30, 1967 concerning the very claim asserted herein, the burden of proof is definitely upon the plaintiff to explain away, if he can, the consequences of said assignment.

Exhibit B, Annexed to Foregoing Affidavit

In paragraphs 12 and 13 of his complaint, plaintiff alleges that:

> "The aforesaid Agreement and Plan of Reorganization, and the surrounding facts and circumstances may be interpreted that Kern has transferred to Tenneco through KCL, all of Kern's choses-in-action and claims, including the aforesaid claim against Occidental for short-swing profits.

or that:

> "• • • the effect of the aforesaid Agreement and Plan of Reorganization and the surrounding facts and circumstances may be that Occidental's aforesaid short-swing profits should inure to and be recoverable by Kern and/or its stockholders."

on the basis of which allegations plaintiff has requested this Court to determine and adjudicate the rights of Kern and its stockholders and of KCL and Tenneco in and to any recovery under the first cause of action. In his moving papers, however, plaintiff takes the position that this question need not be resolved at this time, but may be determined later by the Court after it had first resolved the issue of Occidental's liability under Section 16(b) of the 1934 Act, although citing no authority to support such an unorthodox procedure. Indeed, unless the question of standing is resolved first, any determination by this Court on the merits would be entirely meaningless and without probative value in the event it is later determined that neither the plaintiff nor the corporation which he represents has any standing in this action insofar as the first count is concerned.

Exhibit B, Annexed to Foregoing Affidavit

III

Assuming plaintiff has standing, the consummation of the Kern-Tenneco merger on August 30, 1967, under the facts of this case, did not result in any sale of the Kern shares by Occidental within the meaning of Section 16(b) of the 1934 Act.

This is best illustrated by the very language of Section 16(b) itself, which was designed expressly "for the purpose of preventing the unfair use of *information* which *may* have been *obtained* by such beneficial owner * * * *by reason of his relationship to the issuer* * * * " (Emphasis supplied).

Thus, in deciding whether a certain transaction is deemed to be a "sale" within the meaning of 16(b), the court must first determine whether the transaction complained of in any way makes possible the unfair use of inside information which 16(b) was designed to prevent. If so, then 16(b) liability attaches; if not, then 16(b) does not apply.

As shown by the opposing affidavit of Armand Hammer, at the time and under the circumstances in which Occidental acquired the Kern shares it could not possibly have had any inside information which it acquired as a result of being the beneficial owner of more than 10% of the stock of Kern. It had no inside information whatsoever, since at all times it was held at arm's length by Kern who had written letters to its shareholders for the purpose of discouraging their acceptance of the Occidental's offer.

It cannot be disputed that Occidental held less than 1/20th of 1 percent of Kern stock at the time it announced its public offer to acquire 500,000 shares of Kern on May 8, 1967, and that on the very day Occidental extended its offer to include an additional 500,000 shares of Kern on May 11, 1967, Kern contacted Tenneco for assistance and aid in preventing Occidental from acquiring control over it by

public acquisition, and sent the following telegram to its shareholders:

> "The announcement today by Hammer of Occidental that he is extending his offer confirms our advice to you that his grab for your shares is a raid, an effort to seize control of Kern County Land Company. Let me repeat: You must not be stampeded by Hammer into hasty action. There is no sound reason why you should sell now. I urge you to give most thoughtful consideration to the letter we have sent to you. Do not tender your shares in KCL.
>
> Dwight M. Cochran President
> Kern County Land Company."

The record shows that on the very day Kern announced its acceptance of the Tenneco proposal subject to stockholders approval on May 19, 1967, Occidental had already acquired pursuant to public tender 883,331 of the 884,873 Kern stock involved in this action, and that at no time between the making of the public offer by Occidental on May 8, 1967 and Kern's acceptance of Tenneco offer on May 19, 1967, did Occidental have any knowledge or information of any kind concerning said offer or of the preliminary negotiations relating thereto. Likewise significant is the fact that the moment Occidental learned of the Tenneco offer and its acceptance by Kern's directors, it made no further public offer for additional Kern shares, but instead sought information of Kern as to the terms and provisions of the Tenneco offer which Kern refused to supply, although at that time Occidental was the beneficial owner of more than 10 percent of its outstanding stock. Indeed, even though Occidental had commenced an action against Kern in the California State Court to compel Kern to disclose such terms and other relevant corporate infor-

mation and records, Kern nevertheless refused to make such information or records available to Occidental so as to avoid a proxy fight with Occidental which could have led to the rejection of the Tenneco proposal by the Kern stockholders.*

At the time the Tenneco proposal was accepted by Kern's Board of Directors, defendant was neither an officer nor director of Tenneco or Kern, nor did it control the Board of Directors and management of either company directly or indirectly. The Tenneco proposal was neither suggested by Occidental nor made for its benefit; on the contrary, the sole purpose of the proposal was to prevent Occidental from acquiring control of Kern.

As shown by the evidence, the Tenneco proposal was approved by a majority of Kern's stockholders other than Occidental with full knowledge of the option granted to Tenneco Corporation by Occidental on the new Tenneco Preference Stock which prohibited Occidental from disposing of either its Kern or Tenneco stock for a period of six to fourteen months.

In the light of these circumstances, it cannot seriously be contended that 16(b) was intended to apply to this transaction which from its inception was completely devoid of inside information and preferential treatment.

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* In view of the federal action pending against Kern and Tenneco in California under Section 10(b) of the Securities Act of 1934, we have reason to believe that such information, if disclosed, would have revealed that the true value of the Kern shares at the time of the Tenneco offer was greatly in excess of the value of the new Tenneco preference stock offered in exchange, and that such information if known by the Kern stockholders would have required Tenneco to either withdraw or increase its offer accordingly.

Exhibit B, Annexed to Foregoing Affidavit

IV

Even assuming the above closing resulted in a sale of the Kern shares, nevertheless Occidental did not realize any profits at that time within the meaning of 16(b) of the 1934 Act.

Although the 1934 Act provides no definition of the term "profit" or of the term "realize," the Securities Exchange Commission on prior occasions has taken the position that 16(b) was never intended to apply to paper, as distinguished from real profits, resulting from the sale of securities. See, *Heli-Coil Corporation* v. *Webster*, 352 F.2d 156, 159 (3 Cir., 1965); *Blau* v. *Lamb*, 363 F.2d 507, 525, note 25 (2 Cir., 1966), cited in defendant's opposing brief.

Applying the usual definitions of the term "profit" and "realize" to the facts at bar, it is obvious that Congress intended that ordinarily no gain in the value of securities should be deemed to be "realized" as a "profit" under the 1934 Act in the absence of any definitive act by the beneficial owner of the securities whereby the paper value of the securities has become a real one.

In the case at bar, there is no evidence showing that Occidental had received any cash or had converted the paper value of its Kern shares into real profit at the time of the closing or within six months from the date of its acquisition. The option granted by Occidental to Tenneco Corporation prior to the closing related to the unregistered equity security of a different issuer which by its terms was not exercisable by Tenneco Corporation prior to the expiration of the six months period.

Thus, the fact that on the day of closing the new Tenneco Preference Stock had a paper value in excess of Occidental's cost price of its Kern shares as contended by plaintiff, is immaterial in determining Occidental's 16(b) liability. At page 2 of his moving affidavit, plaintiff's counsel asserts that the amount of short-swing profits realized by defend-

ant Occidental may be reserved for a later determination after its liability under 16(b) has been adjudicated. This, of course, cannot be done, since under the 1934 Act plaintiff cannot establish his right to recovery without first showing that Occidental had conclusively realized some profit within the meaning of 16(b).

Accordingly, in the absence of such proof, plaintiff's motion for summary judgment must be denied.

V

Neither the plaintiff nor the corporation which it represents may predicate a claim under 16(b) on the basis of its own contemptuous act.

On August 21, 1967, Harjean Company commenced an action as stockholder of Kern in the District Court of Knox County, Texas, for the 50th Judicial District, No. 5961, against Kern County Land Company, Tenneco Inc., KCL Corporation, their respective officers and directors, and others, seeking, *inter alia*, a temporary and permanent injunction restraining defendant corporations, in person or by or through their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, selling, conveying, transferring or exchanging the business or assets, real or personal, of Kern County Land Company for shares of Tenneco Cumulative Convertible Preference Stock or stock of any other kind or nature or for any other consideration furnished by Tenneco or KCL Corporation pursuant to the terms of the above Agreement and Plan of Reorganization.

On the same day, the District Court of Knox County issued a restraining order pending the hearing of plaintiff's application for a temporary injunction:

> "restraining the defendants, in person or by their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, con-

summating or concluding any such sale, transfer or exchange of the business or assets of Kern County Land Company * * *."

A copy of said complaint and restraining order is annexed hereto as Exhibits 8 and 9.

The hearing for the temporary injunction was commenced on August 25, 1967, at which time it was adjourned to August 30, 1967. Upon consent of the parties and the Knox County District Court the matter was further adjourned to September 2, 1967. On August 28, 1967, the Knox County District Court entered an order, wherein it was ordered, adjudged and decreed (Exhibit 10):

> "that the hearing on the Plaintiff's application for a Temporary Injunction is hereby continued to and reset for September 2, 1967 at 10:00 A.M. in the District Courtroom in the courthouse of Knox County, Texas in the City of Benjamin, Texas, and that the Temporary Restraining Order heretofore issued be and the same is hereby continued in full force and effect until such time."

Article VIII of the Agreement and Plan of Reorganization, entitled "Conditions Precedent to the Exchange by KCL", section 8.1 provided that the obligations of KCL and Tenneco to consummate this Agreement and Plan of Reorganization and to exchange the shares of Tenneco $5.50 Cumulative Convertible Preference Stock for the properties and assets of Kern shall be subject to and conditioned upon each of the following conditions:

> "(viii) At the Closing Date no holder of any shares of capital stock of Kern or Tenneco shall have enjoined the carrying out of this Agreement and Plan of Reorganization * * *."

Exhibit B, Annexed to Foregoing Affidavit

Nevertheless, despite the aforesaid restraining order and contract provision, Kern, Tenneco and KCL met on August 30, 1967 for the purpose of closing their agreement, and in fact did close on that date with full knowledge of said restraining order and in direct violation thereof.

In the case at bar, plaintiff, on behalf of Kern, relies on that very contemptuous act as a basis for his 16(b) liability claim against Occidental under the first count. As will be shown in defendant's opposing brief, the law is well settled that no one may be permitted to profit by, or take advantage of, his own wrong or to found any claim upon his own iniquity or wrongful act. This rule, dictated by public policy, we submit is dispositive of plaintiff's application and claim for relief herein.

On September 2, 1967, The Knox County District Court entered an order directing Kern, Tenneco and KCL and others to show cause why they should not be punished for contempt for their acts and conduct in closing and consummating the transfer of the assets of Kern to KCL on August 30, 1967, in violation of the temporary restrain ing order entered by said court on August 21, 1967. A copy of said order is annexed hereto as Exhibit 11. The order to show cause was made returnable October 18, 1967. However, due to various legal maneuvers by Kern, the Knox County District Court has been prevented from passing upon the contemptuous acts of the above defendants, and therefore the application is still pending at the present time.

Defendant's opposing brief makes it abundantly clear that the Knox County District Court has the power, upon a finding of contempt, to require the defendants to undo the act they did in violation of its restraining order; consequently, until such application has been determined by said court, plaintiff's claim for relief under 16(b) and motion for partial summary judgment on the basis of the

aforesaid closing is at best premature, and therefore should be denied.

Moreover, as shown by the opposing affidavit of Armand Hammer, the plaintiff as well as the corporation which he represents in this action are estopped from asserting any claim against Occidental under 16(b) on the basis of the aforesaid closing in view of the prior agreement of Kern and Tenneco not to close prior to December 9, 1967, upon which Occidental relied in changing its position to its detriment.

VI

The very fact that defendant Occidental has asserted cross-claims against the other defendants, including the corporation which plaintiff represents in this action, in excess of the amount claimed by plaintiff in his first count, is sufficient of itself to defeat plaintiff's present application.

As shown by Occidental's answer and as noted before, Occidental has asserted cross-claims against Kern and the other corporate defendants in this action in excess of the amount claimed by plaintiff under his first count. One of these cross-claims involves Kern's violation of Section 10(b) of the 1934 Act in failing to disclose to Occidental and to its other stockholders material facts, which if disclosed, would have required a higher proposal by Tenneco and involved a closing date beyond December 9, 1967, thereby eliminating any possible 16(b) claim against Occidental by Kern or its former stockholders. Thus, until the cross-claim is determined on its merits, plaintiff is in no position to demand summary judgment in his favor as to the first count; accordingly, his application for such relief should be denied by this Court in the proper exercise of its discretion.

Exhibit B, Annexed to Foregoing Affidavit

CONCLUSION

By reason of the foregoing, it is respectfully requested that plaintiff's application be denied in all respects. In the event, however, this Court believes that the transaction complained of by plaintiff on this motion was never intended to be proscribed by the provisions of Section 16(b) of the 1934 Act or that the plaintiff lacks standing to raise any such question in this action by reason of the assignment from Kern to KCL, an appropriate order to that effect may be properly entered by this Court although defendant Occidental has not cross-moved for such relief.

SIMON ROSE

(Sworn to February 29, 1968.)

(EXHIBIT 8)

IN THE

DISTRICT COURT OF KNOX COUNTY, TEXAS

No. 5961

HARJEAN COMPANY,

VS.

KERN COUNTY LAND COMPANY, *et al.*

ORIGINAL PETITION

To Said Honorable Court:

Now COMES Harjean Company, a Nebraska Corporation, doing business in Texas, hereinafter called plaintiff,

complaining of Kern County Land Company, a corporation, hereinafter called "Kern", and its officers and directors, George G. Montgomery, H. G. Hawkins, Jr., and Dwight M. Cochran, and Tenneco, Inc., a corporation, hereinafter called "Tenneco", and its officers and directors, Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman and M. H. Covey, and K C L Corporation, a corporation, hereinafter called "K C L", and its officers, Charles S. Taylor, Jr. and Alfred B. Smith, Jr., and Occidental Petroleum Corporation, a corporation, hereinafter called "Occidental", and its officers and directors, Dr. Armand Hammer and Walter R. Davis, defendants, and show the court as follows:

1.

Plaintiff, Harjean Company, is a Nebraska Corporation not licensed to do business in Texas, but is now securing such a permit to do business in Texas, with its principal office and place of business in Knox County, Texas. Said plaintiff is the owner of shares of stock of Kern County Land Company, and it sues for itself individually and as a representative of all other owners of stock in said corporation.

Defendant, Kern County Land Company, is a California corporation, with a permit to do business in the State of Texas, with its principal office and place of business in San Francisco, San Francisco County, California, with D. G. Cook as its agent and representative and the manager of its office in Midland, Midland County, Texas, and with C. T. Corporation System, Republic National Bank Building, Dallas, Texas, as its resident agent for service of process. Defendant, Tenneco, Inc., is a Delaware corporation, with a permit to do business in Texas, with its principal place of business and its principal business in Texas, with M. H. Covey, Tennessee Building, Houston, Texas,

as its registered agent for service of process. Defendant K C L Corporation is a corporation, operating in Texas, with its officers and directors living and residing in Texas, and Charles S. Taylor, Jr., is a vice president of said corporation upon whom service of process may be had. Defendant, Occidental Petroleum Corporation is a California corporation, with a permit to do business in Texas, and with its principal office and place of business in Texas in Midland County, Texas and Walter R. Davis as its officer upon whom citation can be served.

Defendants George G. Montgomery, H. G. Hawkins, Jr., and Dwight M. Cochran are residents of San Francisco, San Francisco County, California, and they have been and are now doing business in Texas, but they have no place of regular business in Texas, and they have not designated any agent or representative to represent them in Texas or to serve in Texas as their agent or representative for service of process, and each of them may be served non-resident citation or each may be served with citation by serving process upon the Secretary of the State of Texas. Defendants Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman, and M. H. Covey are all residents of Harris County, Texas, where service of process may be had upon them. Defendants Charles S. Taylor, Jr., and Alfred B. Smith, Jr., are residents of Harris County, Texas, where service of process may be had upon them. Defendant Dr. Armand Hammer is a resident of Los Angeles, California, and Walter R. Davis is a resident of Midland, Midland County, Texas, where service of citation may be had on them.

This suit is brought against the defendants George G. Montgomery, H. G. Hawkins, Jr., and Dwight M. Cochran, individually and as officers, directors, agents and representatives of Kern County Land Company and as a class representing all of the other officers, directors, agents, and representatives of said company. The suit is brought

against Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman and M. H. Covey, individually and as officers, directors, agents and representatives of Tenneco, Inc., and as a class representing all of the other officers, directors, agents and representatives of said company. The suit is brought against defendants Charles S. Taylor, Jr., and Alfred B. Smith, Jr., individually and as officers, directors, agents and representatives of K C L Corporation, and as a class representing all of the other officers, directors, agents and representatives of said company.

2.

This is a shareholders' derivative suit filed by plaintiff for itself and all other shareholders similarly situated and is prosecuted for the use and benefit of all such shareholders and also for Kern County Land Company. Plaintiff has no interest antagonistic to its fellow class members and adequately represents the class. The issues of law and of fact stated in this action and the consideration to be litigated herein are of general and common interest to all other shareholders of Kern County Land Company and affect all such shareholders in exactly the same manner as the plaintiff is affected. The plaintiff herein fairly insures adequate representation of the interests of the entire class of Kern shareholders. Any judgment recovered by plaintiff herein will be for the use and benefit of said Kern County Land Company and all of its shareholders.

3.

On or about May 19, 1967, the officers and directors of Kern met and approved the execution of an Agreement and Plan of Reorganization to combine Kern with Tenneco, with the business and assets of Kern to be exchanged during the period from September 30 to December 31, 1967, for shares of a new Tenneco $5.50 Cumulative Convertible Preference

Exhibit B, Annexed to Foregoing Affidavit

Stock on the basis of one share of the new Tenneco stock for each share of Kern stock, with the new stock to have a liquidation value of $100.00 and a fixed cumulative annual dividend rate of $5.50. The officers and directors proposed, urged and recommended "without qualification" that the share owners approve such plan and proposal and stated that it was in the best interests of said shareholders. This proposal recommended the approval and adoption of an Agreement and Plan of Reorganization, of June 1, 1967, among Kern, Tenneco and K C L Corporation, a wholly-owned subsidiary of Tenneco, providing, among other things, for the transfer to K C L of all of the assets and property of Kern in exchange for said shares of stock of Tenneco and the assumption by K C L of all of the liabilities and obligations of Kern, upon all of the terms and conditions set forth in the Plan, made a part of the Proxy Statement heretofore attached to and made a part of the Notice of a Special Meeting sent to the shareholders of Kern County Land Company on or about June 16, 1967, which Plan, Proxy Statement and Notice are well known to all of the defendants, and demand is here made upon defendants to produce the original or executed copy of such Plan, Proxy Statement and Notice at any hearing and every trial of this cause, failing which secondary evidence thereof will be offered in evidence by Plaintiff.

Kern is a corporation qualified to do business and it is doing business and in good standing in the states of Arizona, Colorado, Idaho, Louisiana, Mississippi, Montana, Nebraska, New Mexico, Oregon, Texas, Utah and Wyoming. The capital stock of Kern is listed on the New York and Pacific Coast Stock Exchanges. Kern has wholly owned subsidiaries, including Casa de los Cuestos, Inc., Bellevue Farming Company, Calloway Farming Company, K C L Development Company, and others, which are doing business and in good standing in their respective states of incorporation, and Kern owns shares in other corporations,

including J. I. Case Company, Ltd., J. I. Case Thrashing Machine Company, Ltd., and The Case Company, and other such corporations, all doing business and in good standing at this time.

It is proposed by the officers and directors of Kern that there be sold and delivered over to Tenneco and K C L all of the shares of stock of Kern in and to said corporations, along with all of the business and properties, real and personal, owned by or leased to Kern or any of its subsidiaries or subsidiary corporate companies, including the agricultural and grazing lands, the mineral acreage and royalty acreage interests, lands of mineral classifications, and rights of way, easements, servitudes and agreements incident to the operation of irrigation and canal subsidiaries, to the end that Kern will go out of business and plaintiff will no longer own shares of stock or be a part of the corporation heretofore known and operated as Kern County Land Company.

4.

The officers and directors of Kern are proposing to sell, transfer and convey to Tenneco and KCL all of the business and properties and assets, real and personal, of Kern for a consideration far less than its actual value and, unless restrained and enjoined, they will so proceed and sell all of such business and assets. The officers and directors of Tenneco and KCL are attempting to acquire and, unless restrained and enjoined will acquire all of the property and assets of Kern at a price which is inadequate and which is unfair and fraudulent to plaintiff and all other shareholders of Kern. Such agreement, sale, transfer and conveyance of the property of Kern to either Tenneco or KCL is without legal authority and is in excess of any legal authority which defendants have or possess under the laws of the State of Texas, California,

or otherwise, and is fraudulent as to the plaintiff and all other shareholders of Kern. Further, it is a misappropriation and waste of the corporate assets. Said sale and transfer is proposed to be made and is being made by the officers and directors of Kern and by the company itself without any fair or proper valuation of the properties and assets of Kern. Said officers and directors have failed and refused to give mature, lengthy and proper consideration to any such sale or merger. Without full and complete evaluation of Kern's real and personal properties the officers and directors of Kern can not have been in a position to trade with Tenneco or KCL, or to make any recommendation to its shareholders, and the shareholders have not had sufficient knowledge to form an opinion or base a decision on the true value of such properties or to vote for or against the Tenneco offer. By reason thereof, said officers and directors of Kern and the company itself have breached that fiduciary duty which they owe the plaintiff and all whom plaintiff represents to get the highest possible price and consideration for Kern and its shares and its property and assets and have defrauded said shareholders and have wasted and misappropriated and have allowed others to misappropriate the property and assets of Kern.

5.

Defendants Montgomery, Hawkins and Cochran and the other officers and directors of Kern County Land Company by reason of their relationship to plaintiff and those for whom plaintiff sues, owed, at all times material to this suit, the duty to the corporation and to plaintiff and all other shareholders of Kern of acting with the utmost good faith and fair dealings, after full and complete investigation and evaluation of the properties and assets of Kern. Said defendants owe a duty to the corporation and to its shareholders to know the condition of the corporation

and they are presumed to know that which it is their duty to know and which they have the means of knowing. They owe a duty to plaintiff and all other shareholders of Kern, and to the corporation itself, to use every available means of inquiry and investigation to determine the true condition of the company, and to determine the true value of the business and properties and assets of Kern. They owed the duty to exert all efforts in behalf of the corporation and its shareholders to obtain the best possible price for the sale of its property and assets to the end that the sale of said properties and assets would net the corporation the greatest possible return. As directors and officers, they were under a duty not to waste or misappropriate or to allow others to misappropriate the corporate properties and assets. After full and complete inquiry and investigation, it was the duty of the said defendants, and each of them, to fully disclose all material facts that they knew or should have known as directors and officers as to the true value of all properties owned or controlled by Kern County Land Company.

Said defendants, and each of them, have breached their duty and fiduciary obligation and have defrauded the corporation and plaintiff and all other shareholders of Kern in that they have failed and refused and continued to fail and refused to make a full disclosure of all material facts regarding the true value of the business and properties and assets of Kern County Land Company.

Said defendants have made and have caused and allowed to be made to plaintiff and other shareholders of Kern, statements which contained untrue and misleading material facts and omissions of material facts as to the true value of the business and properties and assets of Kern County Land Company in violation of their fiduciary duty and obligation owed to the corporation and to plaintiff and to the other shareholders of said corporation.

Exhibit B, Annexed to Foregoing Affidavit

Said defendants have represented that the agreement, sale and transaction entered into with Tenneco and K C L will be a tax free exchange and that they have obtained a ruling from the Internal Revenue Service to that effect, but they have failed and refused and continue to fail and refuse to disclose the terms and conditions of said ruling and have failed and refused to disclose whether or not these conditions have been fully and completely complied with in good faith.

Said defendants have acted fraudulently and collusively in making a contract with Tenneco and K C L through which Kern County Land Company and its shareholders will part with title to valuable properties to the substantial injury of said corporation and its shareholders. They have wasted and wrongfully misappropriated and have allowed others to wrongfully misappropriate the corporate properties and assets.

Said defendants have participated in acts relative to the corporate property and assets that will result in their personal and private advantage. Certain of the officers and directors of Kern have been assured by Tenneco and K C L that they would be retained by K C L in their present positions and they knew that under other proposals they would not be so retained.

Said defendants, and each of them occupied and still occupy positions of trust and confidence as to plaintiff and all other shareholders and have breached the duties owed by them to the corporation and to plaintiff and all other shareholders by reason of their failure to evaluate all of the properties and assets of Kern and by reason of their failure to advise the shareholders of Kern of the true value of the business, properties and assets of Kern and by reason of their failure and refusal to require and demand full payment for the value of such properties and assets to Kern by Tenneco and K C L.

Exhibit B, Annexed to Foregoing Affidavit

Said defendants have caused and allowed and continue to cause and allow the conduct and material facts of said agreement and contract with Tenneco and K C L to be cloaked in secrecy and to be motivated by selfish purposes.

In all of the above, the officers and directors of Kern County Land Company have committed and continue to commit a breach of trust and their fiduciary duty to Kern County Land Company and its shareholders by their fraudulent, ultra vires and negligent acts.

6.

Occidental is the largest single stockholder of Kern and abstained from voting on the proposed plan to sell and convey the business and assets of Kern to Tenneco. Occidental is the owner of approximately 887,000 shares of stock of Kern. If the plan is approved and carried out, as it will be unless restrained and enjoined, Occidental will receive in exchange for its shares of Kern approximately 887,000 shares of the preference stock of Tenneco. Based upon the information contained in the proxy material, it appears that Occidental had and has information that the value of Kern stock is in excess of the value offered by Tenneco and demand is hereby made that Occidental produce such information on the trial and each hearing of this cause.

7.

Plaintiff has made no effort to secure action from the officers or directors of defendant Kern County Land Company for the reason that the individual defendants herein constitute the officers and members of the Board of Directors of the said corporation and they control said Board of Directors, and any demand on the Board that it bring action in the name of the corporation would have been futile.

Exhibit B, Annexed to Foregoing Affidavit

8.

Unless restrained and enjoined, defendants will continue with their proposed plan and proposal and will exchange the business and assets of Kern for shares of the Tenneco stock and irreparable injury will result to plaintiff and those for whom it sues unless defendants are restrained and enjoined from so selling, transferring or conveying such business and assets of Kern.

The monetary damages which plaintiff will sustain as a result of such wrongful, improper and illegal acts of defendants and the acquisition of all of the business and assets of Kern by the defendants Tenneco and K C L are impossible to ascertain, but plaintiff will suffer damages in excess of $10,000.00, so that unless defendants be restrained and enjoined from so consummating the sale of such business and assets plaintiff will be done grave and irreparable injury for which there is no adequate remedy at law.

WHEREFORE, premises considered, plaintiff prays that defendants be cited in terms of law to appear and answer herein; that a temporary restraining order issue immediately restraining defendant corporations, in person or by or through their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, selling, conveying, transferring or exchanging the business or assets, real or personal, of Kern County Land Company for shares of Tenneco Cumulative Convertible Preference Stock or stock of any other kind or nature or for any other consideration furnished by Tenneco or K C L Corporation; that after due notice and hearing, temporary writ of injunction issue restraining and enjoining said defendant corporations, in person or by or through their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, from so selling, conveying,

transferring or exchanging such business or assets of Kern, and that on hearing of this cause on its merits, said injunction be made permanent; and plaintiff prays for costs of suit, and all such other and further writs, orders and relief to which plaintiff may be shown justly entitled.

CRENSHAW, DUPREE & MILAM

By Tom S. Milam
TOM S. MILAM
P. O. Box 1499
Lubbock, Texas
Attorneys for Plaintiffs

STATE OF TEXAS }
COUNTY OF KNOX } ss.:

BEFORE ME, the undersigned authority, on this day personally appeared TOM S. MILAM, who, being by me duly sworn, upon oath stated that he is fully authorized and empowered to make this affidavit in the capacity therein expressed; that he is attorney for Harjean Company; that he is familiar with the facts alleged in the foregoing petition and affidavit; and each and every fact therein alleged and set forth is true and correct.

TOM S. MILAM

SUBSCRIBED AND SWORN TO before me this 21st day of August, 1967, to certify which witness my hand and seal of office.

DEAN JOHNSTON
Notary Public in and for
Knox County, Texas

Exhibit B, Annexed to Foregoing Affidavit

STATE OF TEXAS }
COUNTY OF KNOX } ss.:

I, XENA H. WALDRON, Clerk of the District Court of Knox County, Texas, do hereby certify that the foregoing is a true and correct copy of the original petition as the same appears of record in my office in book: ..... page: on file.

GIVEN UNDER MY HAND and the seal of said Court, at office in Benjamin, Texas, this 24 day of August, 1967.

XENA H. WALDRON, Clerk
By (Illegible), Deputy

(EXHIBIT 9)

JUDGE'S FIAT

STATE OF TEXAS }
COUNTY OF KNOX } ss.:

In Chambers at Knox City, Texas, this 21st day of August, 1967.

The within and above verified petition of the plaintiff Harjean Company against Kern County Land Company, George G. Montgomery, H. G. Hawkins, Jr., Dwight M. Cochran, Tenneco, Inc., Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman, M. H. Covey, K C L Corporation, Charles S. Taylor, Jr., Alfred B. Smith, Jr., Occidental Petroleum Corporation, Dr. Armand Hammer, and Walter R. Davis, in which plaintiff seeks a temporary restraining order, having been presented to me, without notice to the defendants, and it clearly appearing from the specific facts pleaded and set forth in said verified

petition that plaintiff is the owner of shares of Kern County Land Company and defendants are attempting to and will, unless restrained, exchange the business and assets of Kern County Land Company for shares of Tenneco Cumulative Convertible Preference Stock or other stock or consideration of some other kind or nature; that such sale, transfer, exchange or conversion of such business and assets of Kern County Land Company will cause immediate and irreparable injury, loss and damages to plaintiff and to those for whom plaintiff sues and such loss and damage will result before notice can be served on the defendants; and that plaintiff is entitled to the restraining order as herein granted, same being within its allegations and prayer:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the court that the Clerk of the District Court of Knox County, Texas, issue a temporary restraining order in all things as prayed for in said petition, operative and effective until and pending the hearing below ordered, restraining the defendants, in person or by their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, consummating or concluding any such sale, transfer or exchange of the business or assets of Kern County Land Company, upon the plaintiff executing a bond in behalf of the defendants, conditioned and approved as required by law in the sum of $25,000.00.

The Clerk of this court is further ordered to issue and order a writ commanding the defendants to appear before the Judge of the District Court of Knox County, Texas, 50th Judicial District, in the District Court Room of the Court House of Knox County, Texas, in the City of Benjamin, Texas, on the 30th day of August, 1967, at 10 o'clock A. M., to show cause, if any they have, why a temporary injunction should not be granted upon said petition, effective until final decree herein, which show cause

order shall quote this fiat and shall be accompanied by a true and correct and certified copy of the above and foregoing petition, with such show cause order and temporary restraining order to be served by the Sheriff of any county in the State of Texas in which the defendants or any of them reside or in which they or any of them may be found.

Done this 21st day of August 1967 at 1:30 o'clock P.M.

Judge of the District Court of
Knox County, Texas

(EXHIBIT 10)

IN THE DISTRICT COURT OF KNOX COUNTY, TEXAS

50TH JUDICIAL DISTRICT

No. 5961

HARJEAN COMPANY,

v.

KERN COUNTY LAND COMPANY, *et al.*

COURT ORDER

On this the 28th day of August, 1967, in the above-entitled and numbered cause, it appearing to the Court that heretofore on the 23rd day of August, 1967, the District Court of Midland County, Texas in Cause No. 23170,

Exhibit B, Annexed to Foregoing Affidavit

styled Kern County Land Co., Et Al. versus Harjean Co., Et Al., entered an ex-parte Restraining Order to Harjean Company, the Plaintiff in this cause, and all of its attorneys in this suit restraining prosecution and proceedings in this suit; and it further being made known to this court that the hearing for the Temporary Injunction in the District Court of Midland County, Texas in said Cause No. 23170 was commenced on August 25, 1967, and was not concluded and has now been adjourned until 9:00 A.M. August 30, 1967; and it further being made known to the Court that the parties hereto by their attorneys of record have agreed that the hearing for the Temporary Restraining Order in this cause heretofore set for August 30, 1967, may be postponed until September 2, 1967 at 10:00 A.M.

IT IS THEREFORE ORDERED ADJUDGED and DECREED by the Court that the hearing on the Plaintiff's application for a Temporary Injunction is hereby continued to and reset for September 2, 1967 at 10:00 A.M. in the District Courtroom in the courthouse of Knox County, Texas in the city of Benjamin, Texas, and that the Temporary Restraining Order heretofore issued be and the same is hereby continued in full force and effect until said time.

This 28 day of August, 1967 at 4:25 P.M.

LEWIS M. WILLIAMS
Judge
50th Judicial District of Texas

Agreed to:

By (Signature Illegible) (Illegible)

Approved August 28, 1967, by Clyde Whiteside, Seymour, Texas, one of the attorneys for defendants in the above numbered cause (of counsel).

Exhibit B, Annexed to Foregoing Affidavit

(EXHIBIT 11)

IN THE DISTRICT COURT OF KNOX COUNTY, TEXAS

No. 5961

—o—

HARJEAN COMPANY,

vs.

KERN COUNTY LAND COMPANY, *et al.*

—o—

ORDER

This the 2nd day of September, 1967, came on to be considered the complaint of Harjean Company supported by due affidavit of Tom S. Milam seeking to have Kern County Land Company, a corporation, George G. Montgomery, H. G. Hawkins, Jr., Dwight M. Cochran, Charles A. Anderson, Peter Cook, Jr., Fred A. Davies, Burnham Enersen, Louis Lee Haggin II, William R. Hewlett, Thomas M. McDaniel, Jr., Ernest C. Arbuckle, John M. Preston, Herbert L. Reid and Porter Sesnon, D. G. Cook, Tenneco, Inc., a Delaware Corporation, Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman, M. H. Covey, K C L Corporation, a corporation, Charles S. Taylor, Jr. and Alfred B. Smith, Jr., held in and punished for contempt of this Court in the above matter, because of the acts and conduct below mentioned; and the Court being of the opinion that the complaint is legal and states grounds therefor, it is ordered that the said Kern County Land Company, a corporation, George G. Montgomery, H. G. Hawkins, Jr., Dwight M. Cochran, Charles A.

Exhibit B, Annexed to Foregoing Affidavit

Anderson, Peter Cook, Jr., Fred A. Davies, Burnham Enersen, Louis Lee Hagin II, William R. Hewlett, Thomas M. McDaniel, Jr., Ernest C. Arbuckle, John M. Preston, Herbert L. Reid and Porter Sesnon, D. G. Cook, Tenneco, Inc., a Delaware Corporation, Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman, M. H. Covey, K C L Corporation, a corporation, Charles S. Taylor, Jr. and Alfred B. Smith, Jr. show cause in Benjamin in Knox County, Texas, at ten o'clock a.m. on October 18, 1967, why they should not be punished as for contempt for their acts and conduct in closing and consummating the transfer of the assets of Kern County Land Company to K C L Corporation on August 30, 1967, in violation of the temporary restraining order entered by the District Court of Knox County, Texas, on August 21, 1967, restraining Kern County Land Company, George G. Montgomery, H. G. Hawkins, Jr., Dwight M. Cochran, Tenneco, Inc., Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman, M. H. Covey, K C L Corporation, Charles S. Taylor, Jr., Alfred B. Smith, Jr., Occidental Petroleum Corporation, Dr. Armand Hammer, and Walter R. Davis, their officers, directors, agents or representatives, from in any way or manner, directly or indirectly, consummating or concluding the sale, transfer or exchange of the business or assets of Kern County Land Company pursuant to an agreement or plan of re-organization to combine Kern County Land Company with Tenneco, Inc., all of which is more fully described in Plaintiff's Original Petition filed in the above styled and numbered cause, copy of which is attached hereto and marked Exhibit A, to which reference is here made for all proper purposes; said temporary restraining order being, for good cause shown and by agreement of all parties thereto, continued in full force and effect until September 2, 1967, at 10:00 o'clock a.m. and said temporary restraining order

issued by the District Court of Knox County, Texas, was in full force and effect at the time of the events herein described. And for the further acts and conduct in reporting to the Corporation Commission of the State of California that there were no restraining orders in the State of Texas outstanding, thus inducing him to issue a permit which is a condition precedent to the closing and consummation of the transaction, and by further announcing in the District Court of Midland County, Texas, that counsel for the above named parties advised them that there was no outstanding restraining order, and that they had notice and knowledge of the temporary restraining order issued out of the District Court of Knox County, Texas on August 21, 1967, and continued with their consent until September 2, 1967.

It is further ordered that scire facias issue, commanding Kern County Land Company, a corporation, George G. Montgomery, H. G. Hawkins, Jr., Dwight M. Cochran, Charles A. Anderson, Peter Cook, Jr., Fred A. Davies, Burnham Enersen, Louis Lee Haggin II, William R. Hewlett, Thomas M. McDaniel, Jr., Ernest C. Arbuckle, John M. Preston, Herbert L. Reid and Porter Sesnon, D. G. Cook, Tenneco, Inc., a Delaware Corporation, Gardiner Symonds, Cecil C. Johnson, H. Malcolm Lovett, N. W. Freeman, M. H. Covey, KCL Corporation, a corporation, Charles S. Taylor, Jr. and Alfred B. Smith, Jr. be summoned to appear at the time and place and to the end above stated and that the same be accompanied by a certified copy of such complaint and a certified copy of this order, to be delivered to the said Kern County Land Company, a corporation, George G. Montgomery, H. G. Hawkins, Jr., Dwight M. Cochran, Charles A. Anderson, Peter Cook, Jr., Fred A. Davies, Burnham Enersen, Louis Lee Haggin II, William R. Hewlett, Thomas M. McDaniel, Jr., Ernest C. Arbuckle, John M. Preston, Herbert L. Reid and Porter Sesnon, D. G. Cook, Tenneco, Inc., a Delaware Corporation, Gardiner Symonds, Cecil C. Johnson, H. Mal-

colm Lovett, N. W. Freeman, M. H. Covey, KCL Corporation, a corporation, Charles S. Taylor, Jr. and Alfred B. Smith, Jr. together with a copy of such writ of scire facias.

/s/ LEWIS M. WILLIAMS
LEWIS M. WILLIAMS, Judge of the District Court of Knox County, Texas.

Exhibit C, Annexed to Foregoing Affidavit

(REBUTTAL AFFIDAVIT OF SIMON ROSE, READ IN OPPOSITION TO PLAINTIFF'S MOTION IN MUKAMAL ACTION)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SIMON ROSE, being duly sworn, deposes and says:

1. I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for the defendant Occidental Petroleum Corporation herein. I respectfully submit this affidavit in reply to the affidavit of Charles S. Taylor, Jr., sworn to on March 6, 1968.

2. In his affidavit, Mr. Taylor concedes that in an action in which Kern, Tenneco and KCL were defendants, the

District Judge of Knox County, Texas, on August 21, 1967, entered an *ex parte* restraining order prohibiting said defendants from consummating the Agreement and Plan of Reorganization in question, but contends that said restraining order had been nullified by the later *ex parte* restraining order entered by the District Judge of Midland County, Texas, in a subsequent action in which said defendants were plaintiffs, prohibiting the plaintiff in the Knox County action from interfering with the aforesaid closing.

3. We have been advised by Texas counsel that the later restraining order had no such effect, and that in fact, in view of the prior proceeding pending in Knox County, the District Court of Midland County had no authority or jurisdiction to issue any contrary or conflicting restraining order. In support of his opinion, Texas counsel relies upon the decision of the Texas Supreme Court in *Cleveland* v. *Ward*, 116 Tex. 1, 285 S.W. 1063 (1926).

In that case, the Texas Supreme Court was confronted with similar conflicting restraining orders, one issued by the District Judge of Johnson County, Texas, and the other by the District Judge in Dallas County, Texas. In holding the later restraining order entered by the District Judge of Dallas County in the subsequent action invalid and void, the Supreme Court of Texas reasoned:

> "Since jurisdiction attached upon filing the suit in Johnson County, the rule is elementary that it could not be taken away or arrested by the subsequent proceedings in another court."
>
> • • •
>
> "Since the Johnson County Court is a court of competent jurisdiction, and first acquired jurisdiction of this controversy, has all the necessary parties before it, and is entitled to proceed to judgment; and

since it is evident that all questions necessarily or properly involved will be settled in that case, and that its judgment will be *res adjudicata* as against any judgment the Dallas County Court might render, it follows that the Dallas County case is abated by the Johnson County suit."

• • •

"The reason of the abatement of the subsequent suit by the first where the latter is filed in a court of competent jurisdiction, and that jurisdiction has attached, is that when the suit is brought it is thereby segregated as it were from the general class to which it belonged, and withdrawn from the authority and jurisdiction of all other courts of co-ordinate power."

• • •

"In the case of Peck v. Jenness, just cited, the Supreme Court of the United States said:

'It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. *For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other.*' (Italics ours.)"

• • •

Exhibit C, Annexed to Foregoing Affidavit

"Since the Dallas County District Court had no jurisdiction of this particular case, what was done therein was necessarily void, for judicial action without jurisdiction is void. Freeman on judgments (5th Ed.), Vol. 2, p. 1351, Vol. 1, pp. 672, 673, Sec. 335; Burdett v. State, 9 Texas, 43, 44.

Mr. Freeman, discussing the very question here involved (in Vol. 1, Sec. 335), says:

'It seems impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties. If either has authority to act, its action must necessarily be exclusive, and therefore it is our judgment that when ever either the State or the National courts acquire jurisdiction of an action and the parties thereto, this jurisdiction cannot be destroyed, diminished, or suspended by one of the parties bringing an action in another court, *and that any judgment or order of the latter court is void so far as it conflicts with any judgment or order of the court first acquiring jurisdiction.*' (Italics ours.)"

This extract from Freeman, we believe, states the sound rule, and the only rule which will prevent races from court to court by vigilant counsel, such as this record discloses, and that conflict in the exercise of judicial power in evidence here, which we believe was never contemplated under our judicial system. Courts are erected to settle controversies, not to multiply them. At any rate, the rule announced by Freeman is the one we adopt, and is consistent with that declared by Justice Lipscomb in 1852 in the Burdett case, cited above."

4. Nor is there any merit to Mr. Taylor's implication as to the validity of the order entered by Judge Williams

of Knox County on August 28, 1967 continuing his restraining order to September 2, 1967. As shown by the "Order" itself, the restraining order was continued to September 2, 1967 upon consent of all the defendants. According to Texas counsel, said continuance was agreed to by defendants' counsel in Judge Pickett's courtroom in Midland County. Consequently, whether the order continuing the prior restraining order was signed by Judge Williams or by the Clerk of his Court on his behalf on the basis of the parties' consent is immaterial on this application, since the question of its alleged invalidity must be resolved by the issuing court and not by this Court or by these defendants under the doctrine of self-help.

It is significant to note, however, that in order to prevent Judge Williams from passing upon this question, these very defendants, on September 7, 1967, commenced a new action in the Federal Court of Texas and obtained an *ex parte* restraining order from Judge Brewster on that very day restraining the plaintiff in the Knox County action:

> "E. From directly or indirectly prosecuting any legal action or proceeding before any Court or administrative body or officer for the purpose or effect of interfering with the closing and consummation of the Agreement and Plan of Reorganization described in plaintiff's complaint, or in any wise attempting to void the closing and consummation of such plan.
>
> "F. From directly or indirectly instituting or prosecuting any action designed to obtain punitive or coercive judicial action in the nature of contempt proceedings, or otherwise, against any person, firm or corporation by reason of their actions in the closing of the transaction described in plaintiff's complaint." (Exh. "F", Taylor's Affidavit)

which, of course, is somewhat inconsistent with their present assertion that the prior restraining order by Judge Williams was null and void, or had expired by its own terms.

5. In view of Judge Brewster's restraining order which was entered prior to the order of Judge Hughes remanding the action to Knox County from Federal Court on the ground that its removal by defendants was improper, it comes with a particular ill grace for defendants to contend on this application that following such remand, no further proceedings were taken in that action by the plaintiff.

6. As shown by Mr. Taylor's affidavit, although Judge Brewster advised the various attorneys by letter dated November 14, 1967 of his intention to grant the temporary injunction, he has not yet entered any such injunction. According to Texas counsel, the attorneys for the defendants in that action have continuously urged Judge Brewster to enter the requisite order so that they can file an immediate appeal to the Fifth Circuit, but that Judge Brewster has failed to do so. In view of the clear provisions of 28 U.S.C.A. § 2283, prohibiting a federal court from granting any injunction staying pending State Courts proceedings except in certain limited situations, none of which we are advised, are applicable to the fact situation before Judge Brewster, the validity of Judge Brewster's decision to restrain the pending State Court action in Knox County is somewhat doubtful.

7. According to Texas Counsel, after Judge Williams of Knox County issued an order directing the defendants to show cause why they should not be held in contempt for consummating the above transaction in violation of his restraining order, the defendants removed the action to

Exhibit C, Annexed to Foregoing Affidavit

the federal court action, at which time the plaintiff moved before Judge Hughes to remand the action to Knox County because of lack of diversity of citizenship between the parties.

The application was heard on September 14, 1967, at which time defendants cross-moved to dismiss the action by reason of plaintiff's failure to allege specifically proper demand upon the directors as required under California law. Although Judge Hughes agreed that the complaint before her did not state a claim upon which relief can be granted, she did not dismiss the action as contended by Mr. Taylor at pp. 4-5 of his affidavit. Rather she granted plaintiff leave to serve a further amended pleading containing all the necessary allegations, which was done.

On October 13, 1967, plaintiff again moved to remand the action to Knox County, and defendants again cross-moved to dismiss the further amended pleading. Judge Hughes granted plaintiff's motion to remand and refused to pass upon defendants' cross-motion claiming that this was a matter to be passed upon by the District Judge of Knox County upon remand. We are advised that the order of remand was entered by Judge Hughes on October 13, 1967.

WHEREFORE, it is respectfully requested that plaintiff's motion for partial summary judgment should be denied in all respects.

SIMON ROSE

(Sworn to March 13, 1968)

Affidavit of Richard J. Archer, Read in Opposition to Foregoing Motion

(Document No. 102)

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Titles]

State of California
City and County of San Francisco } ss.:

Richard J. Archer, being duly sworn deposes and says:

1. I am a member of the firm of Morrison, Foerster, Holloway, Clinton & Clark, San Francisco, California, attorneys for Occidental Petroleum Corporation ("Occidental") in the action *Occidental Petroleum Corp.* v. *Kern County Land Company*, No. C-50723-ACW, United States District Court for the Northern District of California which proceeding has been stayed by the Court in the instant actions.

2. I make this affidavit in support of Occidental's motion in opposition to the motions for summary judgment of the several plaintiffs in the instant actions.

3. I was first engaged by Occidental on or about May 24, 1967, to obtain from Kern County Land Company ("Old Kern") certain information, including a list of shareholders of Old Kern, all information relating to offers or proposals to purchase the assets or shares of Old Kern and all reports and studies relating to the value of Old Kern's assets. To obtain such information, I filed two mandamus actions on behalf of Occidental in the Superior Court for the City and County of San Francisco, State of California: *Occidental Petroleum Corp.* v. *Kern County Land Company*, Civil Nos. 579283 and 579464. Copies of

the petitions in said actions are attached hereto as Exhibits A and B, respectively.

4. On or about June 5, 1967, I was informed by Occidental that an Option Agreement, dated June 2, 1967, had been agreed to by Occidental and Tenneco, Inc. ("Tenneco").

5. Prior to June 16, 1967, I informed counsel for Old Kern that I would not dismiss the aforesaid mandamus actions until after I had received a copy of the Proxy Statement of Old Kern ("Proxy Statement"). On or about June 16, 1967, I received and examined a copy of Proxy Statement seeking approval of the sale of Old Kern's assets to Tenneco and subsequently dismissed the mandamus actions. The Proxy Statement failed to mention any claim or potential claim against Occidental for section 16(b) profits. Had the Proxy Statement mentioned a potential 16(b) recovery from Occidental, I would not have dismissed the mandamus actions without discussing the matter further with Occidental. Because the Proxy Statement failed to disclose as an asset of Old Kern (either to remain with Old Kern or to be transferred to Tenneco's subsidiary) any claim or potential claim against Occidental for section 16(b) profits, I understood this to mean that unless Occidental obtained a favorable ruling from the Securities and Exchange Commission with regard to its section 16(b) exposure Old Kern and Tenneco would not close their sale of assets transaction until after the first part of December, 1967, which should have precluded any section 16(b) action against Occidental. Otherwise, the claim or potential claim against Occidental for section 16(b) profits would have appeared in the Proxy Statement as an asset of Old Kern.

6. In addition to failing to mention the possible section 16(b) recovery from Occidental, the Proxy Statement also failed to disclose the fair market values for the assets of

Affidavit of Richard J. Archer, Read in Opposition to Foregoing Motion

Old Kern (consisting primarily of land, oil and gas properties and interests in other companies), that Old Kern had in its possession studies and appraisals of its assets, or that said studies and appraisals were made available to Tenneco but not to Occidental.

7. Based upon a brief ("Brief"), attached hereto as Exhibit C filed by plaintiffs in opposition to defendant's motion to dismiss in *CMC Corp.* v. *Kern County Land Company*, No. 47676, United States District Court for the Northern District of California, I am informed that Old Kern had at least two reports, referred to as the *Ahearn Report* and the *Hartman Report*, placing market values on the assets of Old Kern substantially in excess of their book value as set forth in the Proxy Statement and at least $25 per share more than the price paid by Tenneco for such assets. Again, based upon said Brief, I am informed that prior to the acceptance of Tenneco's offer for the assets of Old Kern by the Board of Directors of Old Kern, said reports were examined and considered by the directors of Old Kern and by various officers and employees of Tenneco. On the other hand, such reports were not made available to me as counsel for Occidental as requested in the above mentioned mandamus actions.

Said Brief also asserts that Harry Volpe, a shareholder of Old Kern, both in writing and in person at the stockholders meeting of Old Kern held on July 17, 1967, to consider the sale of assets to Tenneco, requested but was refused by Old Kern information regarding values of Old Kern's assets.

8. Based upon the foregoing, it will be necessary to take the deposition of at least the following persons on the indicated subjects to ascertain whether the aforesaid statements and omissions in the Proxy Statement and the course of conduct of Old Kern and Tenneco as set forth in the

above mentioned Brief wrongfully induced Occidental into a position whereby it became exposed to alleged section 16(b) liability:

Harry Volpe	—Regarding his attempts to obtain information from Old Kern as to the value of Old Kern's assets.
Jesse James	—To obtain copies of the depositions and exhibits thereto which were taken by him as reporter in the above-mentioned CMC action.
Branch Chief of SEC	—To ascertain what conditions were imposed upon Tenneco and Old Kern in order to obtain a favorable tax ruling and whether such conditions were properly complied with by Tenneco and Old Kern.
F. Cleveland Hedrick & Fred S. Gilbert, Jr.	—To ascertain what conditions were imposed upon Tenneco and Old Kern in order to obtain a favorable tax ruling and whether such conditions were properly complied with by Tenneco and Old Kern.
Loeb Rhoades Company	—To ascertain the background and terms of the purchase from Tenneco, and the subsequent disposition of the Option Agreement between Tenneco and Occidental.

RICHARD J. ARCHER

(Sworn to May , 1970.)

Exhibit A, Annexed to Foregoing Affidavit

(Petition for Writ of Mandate in California Action No. 579283)

Richard J. Archer
Robert D. Raven
Morrison, Foerster, Holloway,
Clinton & Clark
120 Montgomery Street
San Francisco, Calif. 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

In and for the City and County of San Francisco

Occidental Petroleum Corporation, a corporation,
Petitioner,

vs.

Kern County Land Company and Howard G. Hawkins,
Secretary of Kern County Land Company,
Respondents.

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco.

Petitioner respectfully shows:

I

Petitioner Occidental Petroleum Corporation, is the registered holder of more than 500,000 shares of the issued

and outstanding capital stock of respondent Kern County Land Company. Petitioner is informed and believes, and therefore alleges, that the ownership by petitioner of said shares was entered upon the books of respondent Kern County Land Company prior to May 24, 1967. Petitioner is further informed and believes, and therefore alleges, that the number of issued and outstanding shares of capital stock of respondent Kern County Land Company does not exceed 4,323,140 and that petitioner, therefore, is the owner of more than 10 per cent of said shares.

II

Respondent Kern County Land Company is a corporation duly organized and existing under the laws of the State of California, and said respondent has an office and principal place of business at 600 California Street, San Francisco, California. Respondent Howard G. Hawkins, Jr., is the Secretary and custodian of the records of respondent Kern County Land Company.

III

On Monday, May 22, 1967, petitioner made a written demand upon respondent Kern County Land Company, a copy of which is attached hereto and marked "Exhibit A," and caused said demand to be delivered to said respondent Howard G. Hawkins, Jr. Said written demand was directed to the President or the Secretary of respondent Kern County Land Company and demanded on behalf of petitioner that agents of petitioner, specified by name in said demand, be permitted to inspect and make extracts of the share register, duplicate share register, books of account, minutes of proceedings of the shareholders, minutes of proceedings of the board of directors, and minutes

of proceedings of the executive committee, together with all records, books, and documents referred to in said minutes or made a part thereof, of respondent Kern County Land Company. The time and date specified in said demand for the inspection and making extracts of said records and papers was 10:00 A.M., May 23, 1967.

IV

On the same day, May 22, 1967, respondent Kern County Land Company consented to said demand as follows:

"Mr. W. R. Davis
Executive Vice President
Occidental Petroleum Corporation
10889 Wilshire Boulevard
Suite 1500
Los Angeles, California 90024

Dear Mr. Davis:

Your demand as a share owner of Kern County Land Company to inspect the share register of this company and to examine other records outlined under date of May 22 is hereby acknowledged.

We will expect some of the persons designated as your agents to be present for this purpose in our office at 10:00 A.M. on May 23, 1967.

Very truly yours,

KERN COUNTY LAND COMPANY
By (Signed) DWIGHT M. COCHRAN
President"

Exhibit A, Annexed to Foregoing Affidavit

V

At 10:00 A.M., on May 23, 1967, three of the agents of petitioner whose names were specified in said demand presented themselves at said principal place of business of Kern County Land Company for the purpose of inspecting and making extracts of said records and papers. At said time and place respondent Kern County Land Company refused to permit the agents of respondent to inspect or make extracts of any of said records or papers unless and until petitioner furnished respondent Kern County Land Company a written statement of the reasons why it wanted to inspect and make extracts of said records and papers. Thereafter on May 23, 1967, petitioner delivered to respondent Kern County Land Company, through its attorneys, a written statement of the reasons for its said demand and designated four persons as agents of petitioner for purposes of such inspection in lieu of four persons named in said demand.

VI

On May 24, 1967, at 10:00 A.M., certain of the designated agents of petitioner again presented themselves at the said principal office of Kern County Land Company for the purpose of inspection and making extracts of said records and papers. At said time and place respondent Kern County Land Company permitted said agents to inspect certain of the minutes and books of account of respondent designated in said demand of May 22, 1967, but refused and continues to refuse to permit petitioner or its agents to inspect or make extracts of the share register or duplicate share register of respondent Kern County Land Company.

Exhibit A, Annexed to Foregoing Affidavit

VII

At said time and place respondent Kern County Land Company represented to said agents of petitioner that the minutes of the meetings of the board of directors and the executive committee of said respondent held in the month of May, 1967, were not yet prepared. Whereupon said agents of petitioner demanded of said respondent the right to inspect and make extracts of all notes, memoranda and other writings prepared by the secretary or other employee, or agent or said respondent which describe or show the transactions conducted at said meetings and all offers, memoranda of offers and other documents acted upon by the said board of directors or executive committee of said respondent at such meetings. Respondent Kern County Land Company and respondent custodian of its records at said time and place refused and continues to refuse petitioner or agents thereof the right to inspect or make extracts of said notes, memoranda, writings and documents.

VIII

The purpose of petitioner in demanding and seeking the making of extracts and inspection of the registers, books and minutes described in paragraph III of this petition is to protect its interests as a shareholder of respondent Kern County Land Company. Petitioner is informed and believes that the directors of respondent Kern County Land Company have accepted an offer to sell the assets of respondent Kern County Land Company to, or merge with, Tenneco Inc., a Delaware corporation. It is the purpose of petitioner to inspect and make extracts of said registers, books, minutes and documents referred to therein or made a part thereof, of respondent Kern County Land Company to determine the terms of said

offer, to determine whether said offer is inimical to the interests of Kern County Land Company or of petitioner as a shareholder of respondent corporation and to enable petitioner to advise and consult with other shareholders of said respondent with respect to said offer. Unless petitioner is forthwith granted its right to inspect and make extracts of the records and papers referred to above, petitioner will not have an opportunity to evaluate the terms of said sale or merger before the transaction has progressed to such a stage that any attempt by petitioner or of any other shareholder to determine the true value of the offer will be virtually impossible and, further, respondents may have made commitments which would be expensive and burdensome to avoid.

IX

By reason of the refusal of respondent to permit petitioner, by its agents, to inspect and make extracts from the registers, books and minutes of respondent Kern County Land Company, described in paragraph III of this petition, petitioner is unable to ascertain any of the information contained in said registers, books and minutes, to the prejudice of petitioner's interests as a shareholder of respondent Kern County Land Company as stated in paragraph VIII of this petition, and petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.

X

As shown in the affidavit of Charles J. Lee, Controller and Assistant Secretary of petitioner, filed herewith, it is extremely urgent that this petition for alternative writ of mandate be granted ex parte, that it be filed and that it thereafter be served.

Exhibit A, Annexed to Foregoing Affidavit

WHEREFORE, petitioner prays:

1. That this Court issue its alternative writ of mandate commanding respondents to forthwith permit inspection and the making of extracts by agents of petitioner of the share register, duplicate share register, minutes of proceedings of the shareholders, minutes of proceedings of the board of directors, and minutes of proceedings of the executive committee of the board of directors, all notes, memoranda and other writings prepared by the secretary or other employee of respondent Kern County Land Company for purposes of preparing the minutes of meetings which have not been prepared of proceedings of said board of directors and said executive committee, together with all records, books, and documents referred to therein or made a part thereof of respondent Kern County Land Company.

2. That this Court allow petitioner its costs.

3. For such other and further relief as the Court deems proper.

Dated: May 25, 1967.

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

By /s/ RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit A, Annexed to Foregoing Affidavit

(EXHIBIT A)

OCCIDENTAL PETROLEUM CORPORATION
10889 Wilshire Boulevard, Suite 1500
Los Angeles, California 90024

879-1700—477-8521

May 22, 1967.

Mr. Dwight M. Cochran, President,
or
Mr. Howard G. Hawkins, Secretary,
Kern County Land Company,
600 California Street,
San Francisco, California 94108.

Dear Sirs:

The undersigned, a shareholder of Kern County Land Company, hereby makes demand, pursuant to section 3003 of the California Corporations Code, to inspect the share register or duplicate share register, the books of account and the minutes of proceedings of the shareholders, the board of directors and the executive committee of such company, together with all records, books and documents referred to therein or made a part thereof and to make extracts of all thereof for a purpose reasonably related to the interests of the undersigned as a shareholder, to wit, to protect its interest as a shareholder, commencing at 10 o'clock A.M. on May 23, 1967. The undersigned hereby designates Richard J. MacLaury, Bruce A. Mann, Harvey Hinman, Margaret G. Gill, Edward R. Hare, Kennan W. Walker, Robert W. Sandison and Sterling R. Price, Jr., as its agents to make such inspection, provided,

however, that no more than four of said agents shall make such inspection at any one time.

Very truly yours,

OCCIDENTAL PETROLEUM CORPORATION,

By W. R. Davis
W. R. DAVIS, Executive Vice President

CHARLES J. LEE, under penalty of perjury, certifies as follows:

He is an officer, to wit, Assistant Secretary and Controller of OCCIDENTAL PETROLEUM CORPORATION, a corporation, the petitioner named in the foregoing petition, and makes this verification for and on behalf of said corporation. He has read the foregoing petition and is informed and believes the matters stated therein to be true and on that ground alleges that the matters stated therein are true.

Dated at San Francisco, California, May 24, 1967.

CHARLES J. LEE

Exhibit B, Annexed to Foregoing Affidavit

(Petition for Writ of Mandate under Corporation Code Sec. 3005 in California Action No. 579464)

Richard J. Archer
Robert D. Raven
Morrison, Foerster, Holloway,
Clinton & Clark
120 Montgomery Street
San Francisco, California 94104
Telephone: 421-5670

Attorneys for Petitioner
Occidental Petroleum Corporation

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

In and for the City and County of San Francisco

[Same Title]

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco.

Petitioner respectfully shows:

1. Petitioner, Occidental Petroleum Corporation (Occidental), is the registered holder of more than 500,000 shares of the issued and outstanding capital stock of respondent Kern County Land Company (KCL). Petitioner is informed and believes, and therefore alleges, that the ownership by petitioner of said shares was entered

upon the books of respondent KCL prior to May 24, 1967. Petitioner is further informed and believes, and therefore alleges, that the number of issued and outstanding shares of capital stock of respondent KCL does not exceed 4,323,140 and that petitioner is the owner of more than 10 per cent of said shares.

2. Respondent KCL is a corporation duly organized and existing under the laws of the State of California, and said respondent has an office and principal place of business at 600 California Street, San Francisco, California. Respondent GEORGE G. MONTGOMERY is the Chairman of the Board of respondent KCL and respondent DWIGHT M. COCHRAN is President of KCL and as such they are in control of the property and assets of KCL.

3. On Monday, May 29, 1967, petitioner made a written demand upon respondents, a copy of which is attached hereto as "Exhibit A," and is incorporated herein as though set forth in this paragraph, and caused said demand to be delivered to said respondents. Said written demand, among other things, demanded on behalf of petitioner that agents of petitioner be given descriptions of KCL's properties and assets and records thereof, and be permitted to inspect said properties and assets. (See paragraph 7 of said demand and paragraphs 1(b), 2, 6 and 7 of the exhibit attached to said demand.)

4. Notwithstanding said written demand, respondents refuse and continue to refuse to permit petitioner's agents to inspect respondent KCL's property and records thereof.

5. The purpose of petitioner in demanding said property descriptions and records and seeking the right to inspect the same as described in paragraph 3 of this petition is to protect its interests as a shareholder of respondent

Exhibit B, Annexed to Foregoing Affidavit

KCL. Petitioner is informed and believes that respondents and the directors of respondent KCL have accepted an offer to sell the assets of respondent KCL to, or merge with, Tenneco Inc., a Delaware corporation. Respondent KCL did in fact on or about May 19, 1967, transmit to the Pacific Coast Stock Exchange a press release stating among other things:

> "The Board of Directors of Kern County Land Company voted today to accept an offer of Tenneco Inc., subject to the approval of the share owners of both companies, President Dwight M. Cochran announced."
>
> • • •
>
> "'In the opinion of our Board of Directors, supported by the financial advice of Morgan Stanley & Co., this is an excellent offer and its acceptance is in the best interests of our share owners,' Cochran said. 'The Board of Directors recommends its acceptance and has called a meeting of share owners for July 17.'"
>
> • • •

It is the purpose of petitioner to inspect KCL's property and records thereof to determine whether said offer by Tenneco Inc. represents a fair value for the assets and property of KCL and petitioner's proportionate interest as a shareholder of respondent KCL. Unless petitioner is forthwith granted its right to examine and inspect said property and the records thereof, petitioner will not have an opportunity to evaluate the terms of said sale or merger before the transaction has progressed to such a stage that any attempt by petitioner or of any other shareholder to determine the true value of the offer will be virtually impossible and, further, respondent KCL may have made commitments which would be expensive and burdensome to avoid.

Exhibit B, Annexed to Foregoing Affidavit

6. It is not possible to determine the fair market value of respondent KCL's assets from its published reports to stockholders and its financial statements because on KCL's financial statements substantially all property is carried at cost.

7. It is most urgent that agents of petitioner have immediate access to said property and the records thereof. If petitioner is precluded from examining said property and records until management of KCL has completed preparation of its proxy soliciting material in favor of said proposed transaction, has printed and mailed such material to its shareholders and has commenced to solicit proxies for said special meeting, petitioner will be effectively prevented from making an informed determination of the position it should take as a shareholder of KCL or from preparing and distributing to the other shareholders of KCL proxy material opposing the recommendations of management with respect to said proposed transaction.

8. Agents of petitioner must have access to said property and records in sufficient time to permit it to evaluate the proposed transaction, to determine whether it is in its best interest as a shareholder of KCL to oppose said proposed transaction, to prepare proxy soliciting material for distribution to the other shareholders of KCL, to file preliminary copies of said proxy soliciting material with the Securities and Exchange Commission at least ten days prior to the date on which it is proposed that such material shall be mailed to shareholders, and to mail such material in sufficient time for other shareholders of KCL to compare it with the proxy soliciting material distributed by the management of KCL and determine for themselves whether to support or oppose the proposal made by management. If OCCIDENTAL is delayed in obtaining the aforementioned

items, the shareholders of KCL will not have an adequate opportunity to appraise Tenneco's offer before the assets of KCL are disposed of by sale or merger. According to KCL's annual reports a substantial portion of its assets consists of petroleum, natural gas and mining properties.

9. The above-styled Court has heretofore in action No. 579283 issued its alternative writ of mandate requiring KCL to produce for this petitioner KCL's stock register and certain records of KCL's directors' meetings, said writ being returnable in the alternative in Department 16 of the above-styled Court on June 8, 1967, at the hour of 9:30 A.M.

WHEREFORE, petitioner prays:

1. That this Court issue its alternative writ of mandate commanding respondents forthwith to permit inspection of the property of respondent KCL and all its records thereof.

2. That this Court allow petitioner its costs.

3. For such other and further relief as the Court deems proper.

Dated: May 31, 1967.

RICHARD J. ARCHER
ROBERT D. RAVEN
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

By RICHARD J. ARCHER
Attorneys for Petitioner
Occidental Petroleum Corporation

Exhibit B, Annexed to Foregoing Affidavit

(EXHIBIT A)

May 29, 1967.
DELIVER

Kern County Land Company,
600 California Street,
San Francisco, California 94108

Attention: George C. Montgomery,
Chairman of the Board,
Dwight M. Cochran, President

Gentlemen:

On behalf of Occidental Petroleum Corporation ("Occidental"), as the principal stockholder of Kern County Land Company ("KCL"), we hereby request from you the following documents, action, and information:

1. The election of at least one person to be designated by Occidental to the board of directors of KCL.

2. Copies of the reports, documents, etc. described in the list attached hereto as Exhibit A.

3. The date on or about which KCL intends to mail proxy material to its stockholders in connection with the proposed transaction with Tenneco.

4. Whether KCL and Tenneco, or either of them, proposes to file an application with the Department of Investment, Division of Corporations of the State of California relating to the proposed Tenneco transaction, and if so, the date on or about which this will be done.

5. Whether KCL proposes to seek a ruling from the Internal Revenue Service as to the tax effect under the Internal Revenue Code of the proposed transaction with Tenneco upon KCL and its stockholders.

Exhibit B, Annexed to Foregoing Affidavit

6. All information relating to offers or proposals from other than Tenneco and Occidental to purchase assets or shares of KCL or to merge with KCL.

7. Pursuant to California Corporations Code, section 3005, the right to inspect all records of, and to investigate, all property of KCL.

If you have any question as to the foregoing information being kept in confidence, we will agree that it be given only to members or associates of our firm, members or associates of Arthur Young & Company, certified public accountants, a mutually acceptable firm of petroleum engineers, and a mutually acceptable firm of real estate appraisers under agreements not to disclose such information to others except with the agreement of KCL or under order of a court or agency of competent jurisdiction. The cost of collection and reproduction of the information requested will be borne by Occidental.

While we obviously do not expect you to comply with all this request immediately, we do request by 5:00 p.m. today your answers to questions 3 and 4 above, and as to what action will be taken by KCL, and what information will be furnished by KCL, as to the other matters requested, and when such will occur.

Very truly yours,

MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK

By .....
RICHARD J. ARCHER

RJA:pd
Enc.
cc: Burnham Enersen

Exhibit B, Annexed to Foregoing Affidavit

1. Copies of all reports and studies prepared within the past five (5) years by KCL, or by any third party, and presently in the possession of KCL (including, without limitation, any such report or study prepared by White, Weld & Co., or Morgan, Stanley & Co.) relating to any of the following:

(a) Tenneco, Inc., or the proposed transaction between KCL and Tenneco, Inc., relating to the issuance of Tenneco stock to KCL or its stockholders.

(b) The value of any or all of the assets or business of KCL, or any part thereof.

(c) The value of the Common Stock of KCL.

2. Comprehensive report on oil and gas exploration by E. P. Burtchaell, Manager, Oil Production, R. E. Brodek, Manager, Oil Exploration, and James A. Walker, Manager, Oil Lands and Leases, presented to the April 6, 1967 meeting of the board of directors of KCL (Vol. 22 of Minute Book, page 158).

3. Report of Progress of the Company in relationship to its long range forecast, presented to the November 3, 1966 meeting of the board of directors of KCL (Vol. 22 of Minute Book, page 97).

4. Report of Long Range Plans and Objectives of KCL, as presented to the October 3, 1963 meeting of the board of directors of KCL (Vol. 21 of Minute Book, pages 13-18).

5. Reports of the Advisory Planning Committee to the board of directors of KCL for the past five (5) years.

6. Copies of property descriptions of real properties of KCL (including geographical location as to country,

state or province and county and legal descriptions) divided into the following categories:

(a) Properties owned by KCL and operated by KCL or others for agricultural purposes.

(b) Properties owned by KCL from which oil or gas is being extracted, or from which KCL has reason to believe oil or gas may hereafter be extracted.

(c) Properties leased by KCL from others, or in which KCL has some other interest, from which oil or gas is being extracted, or from which KCL has reason to believe oil or gas may hereafter be extracted.

(d) Properties owned by KCL from which other minerals are being extracted, or from which KCL has reason to believe other minerals may hereafter be extracted.

(e) Properties leased by KCL from others, or in which KCL has some other interest, from which minerals are being extracted, or from which KCL has reason to believe minerals may hereafter be extracted.

(f) Properties owned by KCL and operated by KCL or others in its Cattle Division.

(g) Properties owned by KCL and operated by KCL or others in its Water Division.

(h) KCL's Stockdale property.

(i) KCL's Santa Monica Shores property.

(j) Other real properties owned and leased by KCL.

Exhibit B, Annexed to Foregoing Affidavit

7. Copies of reports delivered at each meeting of the board of directors during the last five (5) years with respect to oil and gas operations, the hard mineral program, lessee oil and gas operations and real estate to the extent not described above.

VERIFICATION

I, CHARLES J. LEE, say:

I am an officer, to wit, Assistant Secretary and Controller of OCCIDENTAL PETROLEUM CORPORATION, a corporation, the petitioner named in the foregoing petition, and as such make this verification for and on behalf of said corporation.

I have read the foregoing petition and know the contents thereof and am informed and believe the same to be true and on that ground state that the matters therein started are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 30th day of May, 1967.

Charles J. Lee
CHARLES J. LEE

Defendant Occidental's Response to Rule 9(g) Statement of Plaintiff in Action No. 3

(Document No. 100)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Titles]

Defendant Occidental Petroleum Corporation ("Occidental"), in response to plaintiff's ("New Kern") Rule 9(g) Statement in Action No. 3, states:

1. Admits paragraphs 1, 2, 4, 6, 10 and 12 of New Kern's Rule 9(g) statement dated May 7, 1970.

2. Denies that Occidental purchased pursuant to its public tender offers on and after May 8, 1967 885,649 shares of Kern County Land Company ("Old Kern") at the price set forth in paragraph 3 of New Kern's aforesaid Rule 9(g) Statement, and contends that:

(a) Under said public tender offer which was binding upon Occidental until June 8, 1967, Occidental was obligated to purchase at the price of $83.50 per share the first 500,000 shares of Kern stock tendered by Kern shareholders, with the result each tender received from any shareholder gave rise to a separate stock transaction. At that time the offering price of $83.50 represented approximately $20.00 over the previous closing market price of Kern stock on the New York Stock Exchange.

(b) As a result of said public offer, Occidental received on May 8, 9 and 10, 1967, tenders from

numerous Kern stockholders representing in the aggregate 507,055 shares of Kern's stock, which was more than ten (10) percent of the outstanding capital stock of said corporation. Prior to 2:46 P.M., May 10, 1967, Occidental had received tenders aggregating 433,053 shares of Kern stock which was a little less than ten (10) percent of Kern's outstanding capital stock. At 2:46 P.M. of that same day, Occidental received tenders for 2,500 additional Kern shares, which, when added to the prior tenders, made Occidental the beneficial owner of more than 10 percent of Kern's outstanding capital stock.

(c) On May 11, 1967, Occidental extended its public offer to cover an additional 500,000 shares of Kern at the same price as before and upon the same terms. This offer was likewise good until June 8, 1967, and likewise gave rise to separate stock transactions upon receipt of each tender within the offering period.

(d) Between May 8 and May 19, 1967, Occidental had received in response to its public offer numerous tenders representing in the aggregate 883,331 shares of Kern stock.

(e) Between May 19, 1967, the date Kern's Board of Directors publicly announced its acceptance of the Tenneco proposal of merger, and June 8, 1967, the date Occidental's public offer expired, Occidental received additional tenders representing only 3,376 shares of Kern's capital stock, which Occidental was required to accept under the terms of its public tender offer. Following the public announcement of Kern on May 19, 1967, Occidental made no further public offer for Kern stock.

Defendant Occidental's Response to Rule 9(g) Statement of Plaintiff in Action No. 3

3. Denies paragraph 5 of New Kern's aforesaid Rule 9(g) Statement and asserts that according to Old Kern's Form 10-K report filed with the Securities and Exchange Commission, Old Kern had outstanding 4,332,090 shares at that time.

4. Admits paragraphs 7 and 8 of New Kern's aforesaid Rule 9(g) Statement, but asserts that all such acts were committed by Old Kern and New Kern in deliberate violation of an outstanding restraining order issued by a competent court having jurisdiction both over the subject matter and over the persons of Old Kern and New Kern, and in breach of their agreement with defendant Occidental, all for the purpose of creating colorable claims against Occidental under Section 16(b) of the Securities Exchange Act of 1934 and thus attempting to recapture by reason of their wrongful conduct a substantial portion of the purchase price Tenneco Corporation ("Tenneco") had agreed to pay Occidental under the option of June 2, 1967 upon exercise of the same. The facts supporting defendant's contentions are as follows:

(a) In the latter part of May and first days of June 1967, Tenneco and its counsel met with Occidental and its counsel. At that time Occidental was considering whether or not to oppose the Tenneco proposal on its merits on the basis of information available to the public, whereas Kern and Tenneco on the other hand were desirous of eliminating Occidental, if possible, from the combined company, when as and if the merger plan was consummated. Since Occidental had many other interests, Kern and Tenneco believed that Occidental would be willing to surrender its stock ownership in the combined company if Occidental could be assured that

the merger as well as the surrender of its shares would be consummated in such a way as to avoid any possible Section 16(b) liability to it.

(b) In reliance on Tenneco and Kern's agreement not to close prior to December 9, 1967 in the absence of any exemptive ruling from the Securities and Exchange Commission in Occidental's favor, and upon Tenneco's assurance to do whatever was necessary to avoid any 16(b) liability to Occidental, the latter agreed to execute in favor of Tenneco Corporation, Tenneco's subsidiary, an option to purchase Tenneco Preference Stock which Occidental would receive when, as and if the Tenneco merger was consummated at the price of $105.00 per share, which was done on June 2, 1967.

(c) Following the execution of the option Kern, Tenneco and New Kern entered into an Agreement and Plan of Reorganization dated as of June 1, 1967.

(d) Article 7.9 of the Agreement provided that the closing was to take place not earlier than September 30, 1967 or later than December 31, 1967. These dates were agreed to by Kern and Tenneco because of Tenneco's assurance to Occidental that it would not close prior to the issuance of any exemptive ruling by the Securities Exchange Commission or within six months after Occidental's last acquisition of Kern shares.

(e) On August 21, 1967, Harjean Company, a shareholder of Kern, commenced an action in the District Court of Knox County, Texas, for the 50th Judicial District, No. 5961, against Kern, Tenneco, KCL and others, seeking, *inter alia*, an injunction

enjoining said defendants from consummating the aforesaid merger for the reasons set forth in the Complaint, a copy of which is annexed as Exhibit 8 to the opposing affidavit of Simon Rose sworn to on February 29, 1968.

(f) On the same day, August 21, 1967, the District Court of Knox County issued a restraining order pending the hearing of the stockholder's application for a temporary injunction prohibiting the defendants from consummating or concluding any merger pursuant to the terms of the above Agreement and Plan of Reorganization, a copy of which is annexed as Exhibit 9 to Simon Rose's opposing affidavit sworn to on February 29, 1968.

(g) On August 25, 1967, the hearing for the temporary injunction was commenced but not concluded, at which time it was adjourned to August 30, 1967. Upon consent of the parties the hearing was further adjourned by the Court to September 2, 1967. On August 28, 1967, the Knox County District Court entered an order continuing the above restraining order until September 2, 1967.

(h) Article VIII of the Agreement and Plan of Reorganization provided in section 8.1 thereof that the obligations of New Kern and Tenneco to consummate said agreement shall be subject to and conditioned upon each of the following conditions:

> "(viii) At the Closing Date no holder of any shares of capital stock of Kern or Tenneco shall have enjoined the carrying out of this Agreement and Plan of Reorganization * * *."

(i) In spite of said contract provision, Kern, Tenneco and New Kern, on August 30, 1967, went

ahead and consummated the aforesaid merger with full knowledge of the Knox County District Court's restraining order and in direct violation thereof. Also, such closing was in violation of Tenneco's agreement with Occidental not to close prior to December 9, 1967.

(j) On August 31, 1967, Kern, again in violation of the aforesaid restraining order, advised its shareholders that the merger had been consummated and that they were entitled to receive upon surrender of their Kern certificates, certificates for Tenneco Preference Stock at the rate of one share of Tenneco Preference Stock for each share of Kern stock.

(k) On September 2, 1967, the Knox County District Court entered an order directing Kern, Tenneco, KCL and others to show cause why they should not be punished for contempt for their acts and conduct in consummating and concluding the aforesaid merger in violation of its restraining order.

(l) Upon a finding of contempt, the Knox County District Court had the power to require Kern, Tenneco and KCL to undo the very closing they did in violation of its restraining order, and thus remove any possible 16(b) liability to Occidental in any of these cases.

5. Denies that on August 30, 1967 Tenneco Preference Stock had a value to Occidental of $105 per share as stated in paragraph 9 of New Kern's aforesaid Rule 9(g) Statement, since on that date said shares were under an option call in favor of Tenneco for a period of six to fourteen months, whereunder Tenneco had the right to refuse to exercise its call or option within said call period.

Defendant Occidental's Response to Rule 9(g) Statement of Plaintiff in Action No. 3

In the proxy statement sent to the shareholders of Old Kern on June 16, 1967, it was stated (page 3):

> "Tenneco Corporation has not determined whether it will exercise its option, and Occidental has stated that it has not determined what disposition it will make of the Tenneco Preference Stock if the option is not exercised. The option is not exercisable until after December 9, 1967. Depending upon future investment market conditions, Tenneco Corporation may sell the option or the Preference Stock covered by the option; its present intention is not to purchase such Preference Stock as an investment."

6. Admits paragraph 11 of New Kern's aforesaid Rule 9(g) Statement, but asserts that the payment of $8,866,230 represented the prevailing rate or price for a six to a fourteen months "call" upon the new Tenneco Preference Stock, and asserts further that said option or call represented a benefit to Tenneco and a detriment to Occidental since in the normal situation the call price would never be returned for failure of exercise nor applied against the purchase price of the shares upon its exercise; consequently, said option did not afford Occidental any benefit which was not equally available to any other shareholder. Indeed, any other shareholder would have had the right, if it so desired, to grant a similar call on its shares without any obligation whatsoever to return the call price or apply the same in reduction of the purchase price. Also, Tenneco's acceptance of the option was not conditioned upon Occidental discontinuing any pending lawsuit or waiving any proxy fight nor upon Occidental agreeing to vote its Kern shares in favor of the acceptance of the Tenneco offer at the shareholders meeting.

Defendant Occidental's Response to Rule 9(g) Statement of Plaintiff in Action No. 3

7. Admits paragraphs 13 and 14 of New Kern's aforesaid Rule 9(g) Statement, but asserts that said dividends were received in the normal course of business after the event and were unrelated to any act complained of in any of the actions presently before the Court.

Dated: New York, New York
June 12, 1970

Yours, etc.,

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Defendant Occidental's Response to Rule 9(g) Statement of Plaintiff in Action No. 3

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80 Pine Street
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Exhibit 1, Annexed to Reply Affidavit of Burnham Enersen, Sworn to June 4, 1970.

LETTER TO SHARE OWNERS, NOTICE OF SPECIAL MEETING OF SHAREHOLDERS AND PROXY STATEMENT OF KERN COUNTY LAND COMPANY, EACH DATED JUNE 16, 1967 [PAGES 7-87 OF THE PROXY STATEMENT AND THE EXHIBITS THERETO ARE OMITTED]

(PHOTOSTATS)

(See Opposite) ☞

EXHIBIT 1, ANNEXED to
FOREGOING REPLY AFFIDAVIT

KERN COUNTY LAND COMPANY

600 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94108

June 16, 1967

To The Share Owners of Kern County Land Company:

A Special Meeting of Share Owners will be held on July 17, 1967, to consider a proposal for combining Kern County Land Company with Tenneco Inc., a corporation with some $3 billion in assets and with earnings last year of more than $108 million. Tenneco is an outstanding, well-established industrial corporation with major operations in oil, gas, chemicals and packaging, in addition to being the nation's largest gas transmission company.

Your Board of Directors strongly recommends your approval.

ANNUAL $5.50 PER SHARE DIVIDEND

In the proposed transaction, Kern County Land Company will exchange its business and assets for shares of a new Tenneco $5.50 Cumulative Convertible Preference Stock on the basis of one share of the new Tenneco stock for each share of Kern County Land Company stock. The new stock will have one vote per share, a liquidation value of $100 and a fixed cumulative annual dividend rate of $5.50. *This dividend is more than twice the amount of any annual dividend paid on Kern County Land Company stock and is higher than any previously reported annual per-share earnings of KCL.*

TENNECO PREFERENCE SHARES CARRY FULL VOTING RIGHTS

The Tenneco preference shares will have full voting rights. They will also have the power, voting as a class, to veto the creation of any new preferred Tenneco stock ranking equal with or prior to these preference shares.

TAX-FREE EXCHANGE STATUS

According to counsel, there will be no capital gain or other income tax upon the exchange of KCL shares for the Tenneco preference shares.

CONVERSION PRIVILEGE FROM PREFERENCE TO COMMON SHARES

You will have the right, if you wish, to convert each share of your preference stock into 3.6 shares of Tenneco common stock after July 1, 1969. This enables you to share in the future growth of the combined enterprise. Counsel advises us that such conversion also would be tax-free to you.

RESTRICTIONS ON REDEMPTION OF PREFERENCE STOCK

The Tenneco preference stock cannot be called for redemption by Tenneco for 10 years. It may be called after that time at a price of $110 per share, decreasing thereafter at the rate of $1 per year to a minimum of $100 per share. Whenever called for redemption, however, the holder will have the privilege of the tax-free conversion into 3.6 shares of common stock of Tenneco instead of accepting a cash payment which would involve a tax upon whatever profit might be realized.

KERN COUNTY LAND COMPANY NAME CONTINUES

While the technicalities of the plan require that the present corporate entity of Kern County Land Company be liquidated, the business will continue as a separate unit of Tenneco under the Kern County Land Company name and management and with its present employees.

COMBINED COMPANY HAS BETTER PROSPECTS THAN EITHER ALONE

The Agreement and Plan of Reorganization set forth in the enclosed proxy statement was entered into after comprehensive discussions with the management of Tenneco and after your Board of Directors had carefully considered the proposed combination. The Boards of Directors of the two companies concluded that the combination will provide a stronger and more broadly diversified company with better prospects for the future than either would have alone.

DIRECTORS URGE YOUR FAVORABLE VOTE

The combination of Kern County Land Company and Tenneco Inc., cannot take place unless more than 50 per cent of all Kern County Land Company's outstanding shares are voted for it. If you fail to vote, the legal effect will be the same as if you voted against the transaction.

Your Directors recommend without qualification that you vote for the KCL-Tenneco combination.

We urge you to sign, date and mail the enclosed proxy now.

FOR THE BOARD OF DIRECTORS

Dwight M. Cochran

DWIGHT M. COCHRAN
President

Geo. G. Montgomery

GEO. G. MONTGOMERY
Chairman of the Board

KERN COUNTY LAND COMPANY

600 California Street
San Francisco, California 94108

Notice of Special Meeting of Shareholders

July 17, 1967

Notice Is Hereby Given that a Special Meeting of the Shareholders of Kern County Land Company, California corporation ("KCL"), will be held at 10:30 o'clock in the forenoon on Monday, July 17, 7, on the Penthouse Floor of the Wells Fargo Bank Building, 464 California Street, San Francisco, ifornia, for the following purposes:

1. To consider and vote upon the following proposal for the exchange of the business and assets KCL for shares of $5.50 Cumulative Convertible Preference Stock ($100 liquidation value) of neco Inc. to be distributed to shareholders of KCL at the rate of one share for each share of L Capital Stock:

(a) To approve and adopt an Agreement and Plan of Reorganization ("Plan"), dated as of June 1, 1967, among KCL, Tenneco Inc. and a wholly-owned subsidiary of Tenneco Inc. named KCL Corporation, providing among other things for the transfer to such subsidiary of substantially all of the assets and property of KCL in exchange for shares of $5.50 Cumulative Convertible Preference Stock without par value ($100 liquidation value) of Tenneco Inc. and the assumption by such subsidiary of substantially all of the liabilities and obligations of KCL, upon the terms and conditions set forth in the Plan, a copy of which is annexed as Exhibit A to the Proxy Statement accompanying this Notice, and to consent to such transfers of assets and property; and

(b) Contingent upon approval of the Plan and effective only upon consummation of the transfer of assets provided therein:

(1) to amend the Articles of Incorporation of KCL so as to change its name to 600 California Corporation so that KCL's present name may be used by the new subsidiary of Tenneco Inc. to continue the business under the name Kern County Land Company.

(2) to wind up the affairs of, and voluntarily dissolve and liquidate, KCL, distributing to the shareholders one share of $5.50 Cumulative Convertible Preference Stock ($100 liquidation value) of Tenneco Inc. for each share of outstanding Capital Stock of KCL; and

(3) to authorize the directors and officers of KCL to take all action prescribed in or otherwise necessary or appropriate to carry out the purposes of the Plan and the subsequent change of name and winding up, dissolution and liquidation of KCL.

2. To transact such other business as may properly be brought before the meeting or any adjournment or adjournments thereof.

The Board of Directors has fixed the close of business on June 1, 1967 as the record date for the termination of shareholders entitled to notice of and to vote at the meeting. The management does not know of any business to be brought before the meeting other than as set forth above.

By Order of the Board of Directors

H. G. Hawkins, Jr.
Secretary

e 16, 1967
Francisco, California

Shareholders who do not expect to attend the meeting in person are urged to date, sign and return the enclosed proxy without delay in the enclosed self-addressed postpaid envelope.

If you are present at the meeting, you may withdraw your proxy and vote your shares personally. If you receive more than one proxy because your shares are registered in different names addresses, each such proxy should be signed and returned to assure that all of your shares be voted.

Proxy Statement

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KERN COUNTY LAND COMPANY

PROXY STATEMENT

Special Meeting of Shareholders

July 17, 1967

GENERAL INFORMATION

The accompanying proxy is solicited by the management of Kern County Land Company, a California poration ("KCL"), for use at the Special Meeting of Shareholders to be held on July 17, 1967 called to act n the proposed Agreement and Plan of Reorganization referred to in the accompanying notice of meeting d described in this proxy statement, or at any adjournment of such meeting.

The persons named in the accompanying proxy will vote as directed by the proxy with respect to the proval and adoption of the Agreement and Plan of Reorganization and the related matters referred to in notice of meeting, or, in the absence of such direction, for approval and adoption. As to other items of siness which may come before the meeting such persons will vote in accordance with their best judgment. e management does not know of any business which will be presented to the meeting other than as set forth the accompanying notice.

Only holders of Capital Stock of record at the close of business on June 1, 1967 will be entitled to vote at meeting. The only class of stock of KCL is its $2.50 par value Capital Stock which is entitled to one vote share. As of June 1, 1967 there were 4,330,440 shares outstanding; 20,145 additional shares were held in CL's treasury and are not entitled to be voted.

A proxy may be revoked by the shareholder at any time prior to its exercise by attending the meeting and ting to vote in person or by filing with the Secretary of KCL an instrument of revocation or a duly executed xy bearing a later date.

The expense of this solicitation will be paid by KCL. In addition to the solicitation of proxies by mail, me of the officers, directors and employees of KCL and its subsidiaries may solicit proxies personally and by phone or telegraph. Personnel of Tenneco Inc., a Delaware corporation ("Tenneco"), may be called upon management to aid in the solicitation of proxies and the investment banking firm of Morgan Stanley & Co. y also aid in such solicitation. KCL has also retained Skinner & Co. and Georgeson & Co., which are firms gaged in the business of soliciting proxies; it is estimated that the fees and disbursements of such firms will t exceed $30,000. Upon request, persons holding shares for others, including banks and brokers, who solicit ir principals will be reimbursed for their reasonable expenses.

PROPOSED SALE OF ASSETS

The purpose of the Special Meeting of Shareholders is to consider and act upon the proposed Agreement d Plan of Reorganization dated as of June 1, 1967 ("Plan") among KCL, Tenneco and a wholly owned sidiary of Tenneco named KCL Corporation, providing for the transfer of the assets, properties, business d good will of KCL to such subsidiary of Tenneco. Tenneco will create a new class of 4,500,000 shares of ference stock without par value ("new class of preference stock") of which the $5.50 Cumulative Con- rtible Preference Stock ("Preference Stock") will constitute the first series. In accordance with the Plan, e share of such Preference Stock will be exchanged for each share of Capital Stock of KCL outstanding the date of transfer.

As provided in the Plan, upon the sale of assets, the new Tenneco subsidiary (which will continue the operations of KCL under the name "Kern County Land Company") will assume all liabilities and obligations of KCL except for certain liabilities which will be satisfied out of a fund to be retained by KCL for such purpose. The balance of such fund, if any, remaining after the liquidation of KCL will be paid to the Tenneco subsidiary. The Plan provides that upon the consummation of the transaction KCL will change its name and thereafter will be dissolved and liquidated, distributing to its shareholders one share of Tenneco Preference Stock for each share of KCL Capital Stock. Thus, in addition to voting upon the transfer of the assets, properties, business and good will of KCL in accordance with the Plan, shareholders are being asked to vote upon a change of KCL's name, its dissolution and liquidation and the taking of other necessary actions to implementation of the Plan. A copy of the Plan, without exhibits or schedules, is attached hereto as Exhibit A.

Terms of Tenneco Preference Stock

Each share of the Tenneco Preference Stock which is to be distributed share for share for KCL Capital Stock pursuant to the Plan will be entitled, after payment of dividends on the Preferred Stock and Second Preferred Stock of Tenneco, to a cumulative $5.50 annual dividend payable quarterly, in preference to the Common Stock of Tenneco. Each share of the Preference Stock will be convertible commencing July 1, 19[illegible] into 3.6 shares of Tenneco Common Stock. The conversion ratio is subject to certain adjustments designed to protect against dilution. The Preference Stock will not be callable by Tenneco until July 1, 1977. The initial redemption price will be $110, plus accrued dividends, decreased $1 per year thereafter to $100 on or after July 1, 1987. In the event of liquidation of Tenneco, and after payment of the liquidation preference of the Preferred Stock and Second Preferred Stock, the Preference Stock will be entitled to the applicable redemption price upon voluntary liquidation, or $100 per share plus accrued dividends upon involuntary liquidation, before any payments are made with respect to the Common Stock.

The Preference Stock, together with the Common Stock and Second Preferred Stock of Tenneco, will be entitled to one vote per share at meetings of shareholders of Tenneco. The holders of Preference Stock will have the right to elect two directors of Tenneco if six or more quarterly dividends on the Preference Stock are in arrears and then until all arrearages have been paid. The issuance of additional preferred stock ranking equal with or prior to the new class of preference stock, except for the 2,394,500 presently authorized shares of Preferred Stock and 2,000,000 authorized shares of Second Preferred Stock which are reissuable if converted or retired, requires the affirmative vote of the holders of a majority of the new class of preference stock voting as a class. Shares of the new class of preference stock are reissuable if converted or retired.

It is expected that the Preference Stock, and the Common Stock issuable on conversion of the Preference Stock, will be listed on the New York and Pacific Coast Stock Exchanges on or before December 1, 1967 or 30 days after the consummation of the Plan, whichever is later.

For a description of the rights, privileges and preferences of the Preference Stock and Common Stock of Tenneco see "Description of Tenneco $5.50 Cumulative Convertible Preference Stock" attached hereto as Exhibit B. The rights and preferences of holders of Preference Stock will be governed by the provisions of the Certificate of Amendment of Certificate of Incorporation and the Certificate of Designation, Preferences and Rights of Preference Stock annexed hereto, respectively, as Exhibits C and D. The foregoing description of certain of the rights and privileges of holders of Tenneco Preference Stock is qualified by reference to Exhibits B, C and D.

Recommendation of the Board of Directors

The Board of Directors of KCL has concluded that the proposed acquisition of the assets of KCL by Tenneco is in the best interests of KCL's shareholders and strongly recommends approval of the Plan.

The Plan was entered into after arm's length discussion and negotiation between the managements of the two companies. In approving the exchange ratio and the terms of the Tenneco Preference Stock provided for in the Plan your Board of Directors considered a number of factors, including, among others, the relative asset and balance sheet positions of the two companies, their earnings and dividend records, the market prices of their equity securities and the earnings and growth potential of each company.

The Board of Directors believes that the proposal to exchange one share of Tenneco Preference Stock for each share of KCL Capital Stock pursuant to the Plan is very favorable to the KCL shareholders. The Preference Stock will carry a contractually fixed cumulative annual dividend of $5.50, which is more than twice as great as the $2.60 annual dividend currently being paid on KCL Capital Stock. The $5.50 per share fixed annual dividend, which would be protected by Common Stock earnings of Tenneco, is approximately equivalent to the current total annual earnings per share of KCL. The right to convert the Tenneco Preference Stock into Tenneco Common Stock after July 1, 1969 will also permit the KCL shareholders to participate in the possible future growth and development of the combined enterprises.

In arriving at its conclusions with respect to the attractiveness of the terms of the Tenneco offer, the KCL Board of Directors relied in part upon the advice and opinion of the investment banking firm of Morgan Stanley & Co. The proposed Plan has had the approval of the Directors of KCL and Tenneco. Both Boards are of the opinion that the proposed combination of the companies as provided in the Plan will provide added strength to each and will benefit both companies and their security holders.

Recent Developments Affecting the Plan

On May 8, 1967 Occidental Petroleum Corporation ("Occidental") made a public tender offer on a first-come first-served basis to purchase for cash up to 500,000 shares of Capital Stock of KCL at $83.50 per share. On May 15, 1967 Occidental published an announcement that the number of shares subject to such purchase offer had been increased to 1,000,000. KCL management opposed the Occidental tender offer, which it felt did not fully reflect the values inherent in KCL stock, and informed KCL shareholders that other companies had offered to discuss the possibility of a merger or other combination with KCL on a basis which would not give rise to the payment of any tax by shareholders of KCL. The Occidental tender offer expired June 8, 1967.

Discussions were held during the period May 8 to May 19, 1967 with a number of the companies, including Occidental, which had indicated an interest in a merger or other combination with KCL. After careful study and analysis of the various alternatives available to KCL, including an oral proposal from Occidental, the Board of Directors determined on May 19, 1967 that the offer submitted by Tenneco as described herein was, under the circumstances, clearly in the best interests of KCL's shareholders. At the present time the Plan constitutes a contractual commitment by Tenneco and KCL for the aquisition by Tenneco of the assets and business of KCL, subject only to the approval of shareholders of each company and to fulfillment of certain conditions set forth in the Plan. The Plan entered into with Tenneco is the only definitive proposal before the shareholders for acceptance or rejection.

Occidental Petroleum Corporation is the owner of approximately 887,000 shares of the Capital Stock of KCL amounting to approximately 20% of KCL's outstanding stock. If the Plan is approved and carried out, Occidental will receive in exchange for its shares of KCL Capital Stock approximately 887,000 shares of the Preference Stock of Tenneco. Tenneco Corporation, a subsidiary of Tenneco, has acquired an option from Occidental for the purchase at a price of $105 per share of 886,623 of the shares of Preference Stock to be so received by Occidental. Tenneco Corporation paid $8,866,230 for the option and this amount is to be credited against the purchase price if the option is exercised. Occidental has announced that it will not oppose the adoption of the Plan. Tenneco Corporation has not determined whether it will exercise its option, and Occidental has stated that it has not determined what disposition it will make of the Tenneco Preference Stock if the option is exercised. The option is not exercisable until after December 9, 1967. Depending upon future investment market conditions, Tenneco Corporation may sell the option or the Preference Stock covered by the option; its present intention is not to purchase such Preference Stock as an investment.

Management of KCL

It is the intention of Tenneco that the operation of KCL continue in substantially the same manner in which the business of KCL is presently being conducted. Tenneco also intends to retain KCL's present management and personnel.

Shareholder Vote Required

To become effective the Plan must be approved by the holders of a majority of the outstanding shares of Capital Stock of KCL. Effectiveness of the Plan is also subject to authorization by the holders of a majority of the outstanding shares of the Common Stock and Second Preferred Stock of Tenneco, voting jointly as a class, of an increase in the number of shares of authorized Common Stock of Tenneco and the creation of the new class of preference stock of which the Preference Stock to be issued by Tenneco under the Plan will constitute the first series. California law does not grant to the shareholders of a corporation which is selling all of its business and assets any rights of appraisal or similar rights of dissenters to the transaction.

Conditions to Effectiveness

Consummation of the transaction is conditional upon the fulfillment, unless waived, of various conditions precedent as set forth in the Plan, including the obtaining of a tax ruling from the Internal Revenue Service as described in Article X of the Plan.

Effective Date of Transaction

If the shareholders of KCL and Tenneco take favorable action at their meetings to be held, respectively, on July 17, 1967 and July 11, 1967, it is expected that the sale of assets will be consummated on a date to be agreed upon during the period from September 30 to December 31, 1967. At the closing Tenneco will deliver to KCL certificates evidencing one share of Tenneco Preference Stock for each share of KCL Capital Stock then outstanding to be distributed through Wells Fargo Bank, as exchange agent, as soon as practicable after the closing date to the shareholders of KCL upon the surrender of their certificates of Capital Stock.

TAX RULING

Both companies have applied to the Internal Revenue Service for a ruling to the effect that (i) the acquisition of the assets of KCL by Tenneco's new subsidiary will constitute a reorganization within the meaning of Section 368(a)(1)(C) of the Internal Revenue Code of 1954 and therefore no gain or loss will be recognized to KCL or Tenneco upon such acquisition; (ii) no gain or loss will be recognized to any shareholders of KCL as a consequence of the transaction; (iii) the basis of Tenneco Preference Stock in the hands of KCL shareholders will be the same as the basis of the KCL stock surrendered; (iv) the new Tenneco subsidiary's basis for all the assets of KCL will be determined with respect to the basis of such assets in the hands of KCL; (v) the Tenneco Preference Stock to be issued pursuant to the Plan and to be distributed to the shareholders of KCL will not constitute "Section 306 Stock" to such shareholders, or if it does such Preference Stock of Tenneco will not, because of the provisions of Section 306(b)(4) of the Internal Revenue Code of 1954, be subject to the application of Section 306(a) of such Code; and (vi) no gain or loss will be recognized to any shareholder of KCL as a result of the conversion of Tenneco Preference Stock into Common Stock of Tenneco.

ADDITIONAL FINANCIAL INFORMATION

This proxy statement includes the reports of independent accountants and the financial statements of Tenneco and KCL. Additional financial statements of both companies are on file with the Securities and Exchange Commission in Washington, D.C. and with the New York and Pacific Coast Stock Exchanges.

OTHER MATTERS

All information contained in this proxy statement with respect to Tenneco and its officers and directors has been furnished by Tenneco for inclusion herein.

COMPARATIVE EARNINGS, DIVIDENDS, MARKET PRICES AND BOOK VALUES PER SHARE

Earnings

The following tabulations present the common stock earnings per share on an actual and pro forma basis, based on the earnings as set forth in the Summaries of Consolidated Earnings of Tenneco and KCL and in the Pro Forma Combined Summary of Earnings of Tenneco and KCL, giving effect (based on "pooling of interests" accounting) in the pro forma figures to the contemplated adoption by Tenneco of alternative accounting policies for KCL oil and gas properties to conform substantially to policies used by Tenneco, to the issuance of the Preference Stock deliverable pursuant to the Plan and, where indicated, to the full conversion of such shares and to the full conversion of all other convertible stock of Tenneco, as if the proposed Plan had been in effect during the periods specified below:

Per Share of Tenneco Common Stock	1962	1963	1964	1965①	1966①
Actual	$1.17	$1.33①	$1.51	$1.69	$1.87
Pro Forma Combined					
Assuming no subsequent conversions of outstanding convertible stock	1.08	1.26	1.46	1.69	1.92
Assuming full conversion of all outstanding convertible stock except the Preference Stock	1.08	1.26	1.45	1.66	1.85
Assuming full conversion of all convertible stock	1.18	1.32	1.47	1.63	1.78
Per Present Share of KCL Capital Stock					
Actual					
As Reported	$4.04	$4.01	$4.17	$4.75	$5.25
Computed in accordance with alternative accounting policies used in the Pro Forma Combined Summary of Earnings and described in Note ① thereto	4.55	4.78	4.99	5.54	6.08
Pro Forma Combined					
Assuming no conversion of Preference Stock (Dividend on one share of Tenneco Preference Stock)	5.50	5.50	5.50	5.50	5.50
Assuming full conversion of all convertible stock (per 3.6 shares of Tenneco Common Stock)	4.25	4.75	5.29	5.87	6.41

Notes:

① Earnings of Tenneco for the year 1963 are exclusive of a Special Credit in the amount of 11¢ per share.

② Fiscal years ended October 31, 1965 and 1966 for KCL.

Dividends

The following tabulation sets forth the historical per share dividend data of Tenneco and KCL with certain related dividend data on a pro forma basis assuming the proposed Plan was in effect in the periods indicated.

Tenneco Common Stock—	1962	1963	1964	1965①	1966①
Historical Cash Dividends	$ .98②	$ .99②	$ .99	$1.04③	$1.17
KCL Capital Stock—					
Historical Cash Dividends	$2.40	$2.40	$2.40	$2.40	$2.55
Pro Forma Cash Dividends on Preference Stock	5.50	5.50	5.50	5.50	5.50
Pro Forma Cash Dividends Assuming Conversion of Preference Stock and Cash Dividend Declarations at Tenneco's Historical Rate (per 3.6 shares)	3.53	3.56	3.56	3.74	4.21

Notes:

① Fiscal years ended October 31, 1965 and 1966 for KCL.

② Plus one per cent common stock dividend.

③ Plus dividend in kind of Midwestern Gas Transmission Company common stock. The market value at date of distribution was equivalent to 9.5¢ per share of Tenneco stock.

The most recent quarterly dividend on Tenneco Common Stock was $.30 per share and the most recent quarterly dividend on KCL Common Stock was $.65 per share. The quarterly dividend payable on the Tenneco Preference Stock will be $1.375 per share.

Market Prices

The high and low sales price of Tenneco Common Stock and KCL Capital Stock on the New York Stock Exchange (as reported by the *National Quotation Bureau*) for 1965 and 1966 and the first two quarters of 1967 (through June 9, 1967) were as follows:

	Tenneco Common Stock		KCL Capital Stock	
Quarter Ended	High	Low	High	Low
1965				
March 31	25¼	23¼	65	57
June 30	25¼	21⅜	63¾	56
September 30	24¼	22½	68¾	57
December 31	25	23	71¾	63¾
1966				
March 31	24⅜	23	75	66
June 30	23¾	21⅜	76½	62½
September 30	22¾	19¾	68¾	56
December 31	22½	19¾	65¾	51¾
1967				
March 31	24⅜	20¾	64¾	58
June 30 (through June 9)	25	23½	94¾*	57¾

*Announcement of the Occidental tender offer to purchase KCL Capital Stock at $83.50 per share was made on May 8, 1967. KCL Capital Stock did not trade on the New York Stock Exchange on May 8. On May 9 the closing sale price of KCL Capital Stock was $81.875 as compared with $63.625 on May 5, the last day of trading prior to announcement of the tender offer. On May 22, 1967, the first trading day following the announcement of agreement in principle with respect to the Plan by KCL and Tenneco, the closing sale price of KCL Capital Stock was $93.00 and the closing sale price of Tenneco Common Stock was $24.50, as compared with closing sale prices of such stocks on the preceding trading day, May 19, of $87.875 and $23.62½ respectively. The closing sale prices for such shares on June 9, 1967 were $89.25 and $24.75, respectively.

Book Values Per Share

As of April 30, 1967 the aggregate book value of the Common Stock of KCL was $143,743,000 or $33.2[illegible] per share, and the aggregate book value of the Common Stock of Tenneco was $700,573,000 or $14.11 per share. After giving effect to the proposed transaction in the manner set forth under Pro Forma Combined Balance Sheet of Tenneco and KCL herein, the pro forma book value of the Common Stock of Tenneco was the equivalent of $15.17 per Tenneco share at April 30, 1967. Assuming full conversion of all convertible stock the pro forma book value of Tenneco Common Stock would have been $14.84 per share and the pro forma book value of the 3.6 shares of Tenneco Common Stock issuable upon conversion after July 1, 19[illegible] of the one share of Tenneco Preference Stock to be exchanged for each share of KCL Capital Stock would have been $53.42.

Notice of Motion of Plaintiffs Other Than KCL Corporation for Summary Judgment

(Document No. 96)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Titles]

Sirs:

Please take notice that upon the pleadings herein, the affidavit of Stephen Abrams, duly verified the 6th day of May, 1970, the depositions and answers to interrogatories on file in this Court, and all of the prior proceedings herein, the undersigned will move this Court, at a Motion Term thereof to be held in the United States Court House, Foley Square, City of New York, at a time and place to be fixed by the Court, for the following relief in Actions Nos. 67 Civ. 2858, 67 Civ. 3291 and 67 Civ. 4977:

1. For an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment against defendant, Occidental Petroleum Corporation, adjudging said Occidental Petroleum Corporation liable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) on the ground that there is no genuine issue of any material fact as to the liability of said Occidental Petroleum Corporation or the amount of profit realized by said defendant and that plaintiffs are entitled to judgment on the merits as a matter of law;

2. In the alternative, for an order granting plaintiffs partial summary judgment pursuant to Rule 56 of the

Notice of Motion of Plaintiffs Other Than KCL Corporation for Summary Judgment

Federal Rules of Civil Procedure, adjudging defendant, Occidental Petroleum Corporation, liable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), reserving the question of the amount of profit realized by said defendant for subsequent determination; and

3. For such other and further relief as the Court may deem just and proper.

Plaintiffs will serve a copy of a Memorandum of Law ten days or more before the return date of this motion.

Dated: New York, N. Y.
May 8, 1970

Yours, etc.

WOLF POPPER ROSS WOLF & JONES
General Counsel for Plaintiffs
(other than KCL Corporation)

By: BERNARD WOLF
A Member of the Firm
Office & P. O. Address
845 Third Avenue
New York, N. Y. 10022
Tel.: PL 9-4600

To:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, Esqs.
Attorneys for Defendant
Occidental Petroleum Corporation
477 Madison Avenue
New York, N. Y. 10022

Notice of Motion of Plaintiffs Other Than KCL Corporation for Summary Judgment

CAHILL, GORDON, SONNETT, REINDEL & OHL, Esqs.
Attorneys for Defendant, Tenneco, Inc. and Tenneco Corporation, and Plaintiff KCL Corporation
80 Pine Street
New York, N. Y. 10005

DAVIS, POLK & WARDWELL, Esqs.
Attorneys for Defendants, Kern County Land Company, Dwight M. Cochran and George Montgomery
One Chase Manhattan Plaza
New York, N. Y. 10005

KAUFMAN, TAYLOR, KIMMEL & MILLER, Esqs.
Attorneys for Plaintiff Mukamal
41 East 42nd Street
New York, N. Y. 10017

POMERANTZ, LEVY, HAUDEK & BLOCK, Esqs.
Attorneys for Plaintiff, Colonial Realty Corporation
295 Madison Avenue
New York, N. Y. 10017

Notice of Cross-Motion of Defendant Occidental to Dismiss Claims

(Document No. 99)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Titles]

Sirs:

Please take notice that, upon the annexed affidavit of Simon Rose sworn to May 18, 1970, defendant's statement pursuant to Local Rule 9(g), and upon all of the proceedings heretofore had herein, the undersigned will cross-move before the Honorable Edmund L. Palmieri, on June 17, 1970, at 4:15 P.M., at the United States Courthouse, Foley Square, New York, or at any other time specified by the Court, on behalf of the defendant Occidental Petroleum Corporation, for the following relief:

(a) for an order pursuant to Rule 56, Rule 12(b)(7), Rule 12(c) or Rule 9(a), F.R.C.P., dismissing all the claims under Section 16(b) of the Securities Exchange Act of 1934 asserted by each of the plaintiffs in Actions Nos. 1, 2 and 4 above, and by the Intervenor plaintiff in Action No. 3, on behalf of the former Kern County Land Company ("Old Kern"), because of their lack of standing to sue;

(b) alternatively, for an order pursuant to Rule 42(b), F.R.C.P., directing a separate trial on the issue of standing to sue in advance of any trial on the merits in the event this Court should conclude that triable issues exist with regard to said question; and

Notice of Cross-Motion of Defendant Occidental to Dismiss Claims

(c) for such other and further relief as to this Court may seem just and fair in the premises.

PLEASE TAKE FURTHER NOTICE that, pursuant to the direction of Honorable Edmund L. Palmieri, opposing papers and memoranda must be served upon the undersigned on or before May 28, 1970.

Dated: New York, New York
May 18, 1970

Yours, etc.,

PHILLIPS, NIZER, BENJAMIN, KRIM
& BALLON
Attorneys for Defendant

OCCIDENTAL PETROLEUM CORPORATION

By SIMON ROSE
A Member of the Firm
Office & P. O. Address
477 Madison Avenue
New York, N. Y. 10022
758-6700

To:

WOLF, POPPER, ROSS, WOLF & JONES
Attorneys for Plaintiff Abrams and General Counsel in Actions Nos. 1, 2 and 4
845 Third Avenue
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KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Plaintiff Mukamal in Action No. 2
41 East 42nd Street
New York, New York

Notice of Cross-Motion of Defendant Occidental to Dismiss Claims

POMERANTZ, LEVY, HAUDEK & BLOCK
Attorneys for Plaintiff Colonial Realty Corporation in Action No. 4
295 Madison Avenue
New York, New York

DAVIS, POLK & WARDWELL
Attorneys for Defendants Old Kern, Dwight M. Cochran and George M. Montgomery
One Chase Manhattan Plaza
New York, New York

CAHILL, GORDON, SONNETT, REINDEL & OHL
Attorneys for Tenneco, Inc., Tenneco Corporation and Kern County Land Company
80 Pine Street
New York, New York

Affidavit of Simon Rose, Read in Support of Foregoing Cross-Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLES]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SIMON ROSE, being duly sworn, deposes and says:

1. I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for defendant Occidental Petroleum Corporation, and I respectfully submit this affidavit in support of defendant's cross-motion for an order dismissing all the Section 16(b) claims asserted against said defendant by the plaintiffs in Actions Nos. 1, 2 and 4, and by the Intervenor plaintiff in Action No. 3 above, on behalf of Kern County Land Company ("Old Kern"), the merged corporation, on the ground of their lack of standing to sue, or, in the alternative, for a separate trial on this question in advance of the trial on the merits.

2. It is undisputed that "Old Kern" assigned all its assets, claims and demands, including any Section 16(b) claim it may have had against defendant Occidental Petroleum Corporation, to KCL ("New Kern") under the Agreement and Plan of Reorganization dated as of June 1, 1967, and Assignment dated August 30, 1967. The Agreement and Plan of Reorganization is annexed as Exhibit "D" to the affidavit of David R. Hyde sworn to May 6,

1970, and the Assignment is annexed as Exhibit "G" to said affidavit.

3. It is equally undisputed that defendant Occidental Petroleum Corporation is a defendant in each of the four actions noted above, and that Section 16(b) claims are asserted against said defendant in each of said actions, the only difference being the claims alleged by plaintiffs in Actions Nos. 1, 2 and 4 are asserted on behalf of "Old Kern", whereas the claim asserted in Action No. 3 is by "New Kern" itself.

4. As shown in defendant's memorandum, any such claim under Section 16(b) against defendant Occidental Petroleum Corporation (assuming one does in fact exist) properly belongs to the plaintiff in Action No. 3 and that all the other plaintiffs in Actions Nos. 1, 2 and 4 have no standing whatever to sue with regard to said claims either as former shareholders of "Old Kern" in view of the prior agreement and assignment, or as new shareholders of "New Kern" in view of the fact that "New Kern" has commenced its own action against said defendant for such relief under Section 16(b) of the Securities Exchange Act of 1934 in Action No. 3.

5. In the event, however, this Court should conclude that triable issues exist with regard to the question of standing to sue and that such issues cannot be determined in the absence of a trial, then in that event, defendant requests a separate trial of that issue in advance of the main trial in the interests of expediency and economy pursuant to Rule 42(b) of the Federal Rules of Civil Procedure.

Affidavit of Simon Rose, Read in Support of Foregoing Cross-Motion

6. It is obvious that the disposition of this issue in advance of the main trial will lead to a dismissal of one or more of the four actions. Indeed, if the Court concludes that the Section 16(b) claims properly belong to "New Kern", then Actions Nos. 1, 2 and 4 insofar as they assert claims under Section 16(b) would be dismissed, and the same would be true of the claims asserted by the Intervenor plaintiff in Action No. 3. On the other hand, should this Court conclude that these claims rightly belong to the shareholders of "Old Kern", then Action No. 3 commenced by "New Kern" would be dismissed. In either event, justice would be served by limiting the number of actions defendant would be required to defend in this Court with regard to the same issues.

WHEREFORE, it is respectfully requested that defendant's motion be granted in all respects.

SIMON ROSE

(Sworn to May 18, 1970.)

Judgment of the District Court, Entered February 18, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 4042

KERN COUNTY LAND COMPANY, a Delaware Corporation,
Plaintiff,

and

STEPHEN ABRAMS,
Plaintiff-Intervenor,

against

OCCIDENTAL PETROLEUM CORPORATION, a California Corporation,
Defendant,

and

TENNECO INC., a Delaware Corporation, et al.,
Defendants to Counterclaims.

This action came on for hearing before the Court, the Honorable Edmund L. Palmieri, District Judge, presiding, on plaintiff's motion for summary judgment on the complaint and with respect to certain counterclaims, and the issues having been duly heard, and the Court having rendered its decisions of November 27, 1970 and January 27, 1971 with its findings of fact and conclusions of law; and the Court having found no just reason for the delay of entry of this judgment, and having directed entry of said judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff, Kern County Land Company, a Delaware corporation, recover of Occidental Petroleum Corporation the sum of $19,506,419.22 with pre-judgment interest to date at the rate of 6% per annum as follows:

Judgment of the District Court

1. on $886,623.00 from June 2, 1967, amounting to $197,632.89;

2. on $7,979,607.00 from June 9, 1967, amounting to $1,769,506.14;

3. on $575,671.85 from September 21, 1967, amounting to $117,815.43;

4. on $8,846,750.00 from December 11, 1967, amounting to $1,692,758.94;

5. on $1,217,767.37 from January 9, 1968, amounting to $227,205.32;

for a total recovery of $23,511,337.94, together with post-judgment interest thereon from the date of entry of this judgment at the rate of 7½%, as provided by law; and it is further

ORDERED, ADJUDGED and DECREED that plaintiff Kern County Land Company, a Delaware corporation, and defendants to counterclaims Tenneco Inc., 600 California Corporation, Dwight M. Cochran and George G. Montgomery have judgment against defendant Occidental Petroleum Corporation dismissing the first, second, third and seventh counterclaims asserted in the Amended Answer of defendant Occidental Petroleum Corporation; and it is further

ORDERED, ADJUDGED and DECREED that the intervenor's complaint of Stephen Abrams, intervenor, be and the same hereby is dismissed as moot in the light of the recovery awarded to plaintiff.

Dated: New York, New York
February 18th, 1971

s/ EDMUND L. PALMIERI
U. S. D. J.

Judgment entered February 18th, 1971

s/ JOHN LIVINGSTON
Clerk of the Court

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLES]

Sirs:

Notice is hereby given that defendant Occidental Petroleum Corporation hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the four judgments entered in the above-entitled actions on the 18th day of February, 1971, except those parts of the judgments entered in Actions Nos. 1, 2 and 4 which dismissed plaintiff's cause or causes of action as against said defendant.

Dated: New York, New York
February 26, 1971

Yours, etc.,

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
Attorneys for Defendant

OCCIDENTAL PETROLEUM CORPORATION

By LOUIS NIZER
A Member of said Firm
477 Madison Avenue
New York, New York 10022
Tel. No. 758-6700

To:

CLERK, UNITED STATES DISTRICT COURT

CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street
New York, New York

DAVIS, POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 71-1275

67 Civ. 4042

KERN COUNTY LAND COMPANY,
A DELAWARE CORPORATION,
Plaintiff-Appellee,

and

STEPHEN ABRAMS,
Plaintiff-Intervenor,

against

OCCIDENTAL PETROLEUM CORPORATION,
A CALIFORNIA CORPORATION,
Defendant-Appellant,

and

TENNECO INC.,
A DELAWARE CORPORATION, ET AL.,
Defendants to Counterclaims-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF APPELLEES KERN COUNTY LAND COMPANY ("NEW KERN"), ET AL. FOR REHEARING OR, ALTERNATIVELY, REHEARING IN BANC

Appellees Kern County Land Company ("New Kern"), Tenneco Inc. and Tenneco Corporation respectfully urge the Court to grant rehearing or, alternatively, rehearing in banc, of its decision herein rendered October 13, 1971 reversing Judge Palmieri's judgment in the district court holding defendant Occidental Petroleum Corporation ("Occidental") liable to New Kern in the amount of $23,511,337.94 in profits, dividends and interest, pursuant

to Section 16(b) of the Securities Exchange Act of 1934, and instead directing entry of judgment dismissing the complaint.

The reasons for seeking rehearing or, alternatively, rehearing in banc, are that:

(a) The decision erroneously directs summary dismissal of the complaint although the record below was not complete and substantial issues of fact remain unresolved. At the very least, the case should be remanded for trial below with respect to the facts concerning the option agreement, many of which, including the existence of a contemporaneous proxy given by Occidental, were not part of the record before the district court on New Kern's motion for summary judgment (Occidental not having cross-moved for judgment in its favor) and, consequently, not before this Court. A trial should be had in order to determine whether under the criteria set forth by this Court in its opinion the option agreement by which Occidental ultimately realized a $17,712,980 profit was "in truth and in fact a sale" (Slip Op. 79).

(b) The decision presents important and far-reaching questions of general applicability under Section 16(b). As noted within, a district court decision filed October 12, 1971, the day before the decision here, finding the defendant liable under Section 16(b) in an almost identical situation, was withdrawn on October 15, 1971 in view of the Court's decision here. *American Standard, Inc.* v. *Crane Co.*, CCH Fed. Sec. L. Rep. ¶ 93,237 (68 Civ. 2461, S.D.N.Y., Lasker, J.).

(c) The decision appears to be in conflict with a recent decision of this Court, *Newmark* v. *RKO General, Inc.*, 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970), by distinguishing that case upon its facts and holding that the acquisition of a more than 20% beneficial interest in a class of securities by

means of a tender offer, followed less than six months later by their exchange for securities of a different company, the situation also presented in the *American Standard* case, *supra*, does not present an opportunity for speculative abuse.

(d) The decision is in conflict with a recent decision of the Seventh Circuit, *Bershad* v. *McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), in holding that an insider's sale of an option to sell securities (here, in return for an $8,886,230 cash payment to be applied against the $93,095,415 purchase price) is not as a matter of law a "sale" for Section 16(b) purposes (unless the court finds it on the particular facts to be a disguised sale), although the option is entered into less than one month after the purchase of the securities in question.

I.

The action should be remanded for trial rather than for summary dismissal of the complaint.

Although noting that Occidental did not cross-move for summary judgment below, this Court directed on appeal that such judgment be entered in its favor. Without questioning the Court's power to do this in a proper case, we submit that this was not an appropriate case for such action.

This is not a case where discovery had been completed. Indeed, there was never any documentary discovery of Occidental's files. Nor were there any depositions taken of various persons who acted for Occidental, such as those at the brokerage firm of Donaldson, Lufkin & Jenrette, whose advice to Occidental with respect to the option was relied upon in this Court's opinion.

New Kern moved for summary judgment at a point in the litigation when it believed such motion to be warranted and attempted to confine the motion to undisputed facts,

deliberately leaving aside facts subject to challenge, and making no effort to dispute matters which it believed were irrelevant to its legal position. Occidental refrained from cross-moving for summary judgment in its favor but, instead, asked Judge Palmieri merely "to deny plaintiffs' motion for summary judgment pending a full trial on the merits" (Opposing Aff. of Simon Rose, sworn to May 28, 1970, 721a).*

The effect of this Court's decision to direct entry of judgment in Occidental's favor is perhaps best illustrated with respect to the option agreement. The opinion notes that "a court might find in truth and fact a sale had occurred when the 'option' was granted", but goes on to state that "[w]e see no basis for such a finding here, and we do not read the district court's opinion as making one***" (Slip Op. 79). However, appellees made no effort to have the court below make such a factual determination on their motion for summary judgment, contending that the option must be deemed a "sale" as a matter of law. Thus, the full array of facts relevant to a factual determination of whether or not the option was a sale were not part of the record in the district court and consequently not before this Court.

For example, while the opinion here distinguishes *Bershad* v. *McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert.*

---

* On this appeal, Occidental asserted in one sentence of its 122-page brief that the district court "should have granted summary judgment to Occidental or proceeded to trial on the merits" (Occidental Br., p. 5), noting in a footnote that this Court had power to grant judgment in its favor despite Occidental's failure to move for such relief. The point was not pressed and appellees made no response to it since it did not appear to be seriously urged. Although the Court's opinion asserts that "inquiry at the argument failed to reveal any new facts that might be adduced by them [appellees] at an evidentiary hearing" (Slip Op. 82), none of appellees' counsel present at the argument recall any inquiry as to what further facts they might adduce at a hearing. Had appellees appreciated the Court's interest in this matter, they would have responded as they do in this petition.

denied, 400 U.S. 992 (1971), on the ground that there the optionor gave the optionee an irrevocable proxy to vote the shares in question (Slip Op. 81), New Kern can and will prove, if this Court will remand the matter for further proceedings below, that Occidental also gave Tenneco a proxy, which was intended to be irrevocable, with respect to its Old Kern shares.* Attached hereto are copies of an Occidental proxy dated June 2, 1967 (the date of execution of the option) signed by Walter R. Davis, Executive Vice President of Occidental, and a substitute proxy, signed by both Mr. Davis and Paul C. Hebner, Secretary of Occidental, dated June 5, 1967 (the following Monday) to Albert J. Brown, of Pillsbury, Madison & Sutro, San Francisco, counsel for Occidental, authorizing him "specifically" to vote Occidental's shares "in favor of the proposed sale of the assets of Kern County Land Company to a wholly-owned subsidiary of Tenneco Inc.". Also attached is a covering letter from Mr. Brown's partner, Mr. Bruce Mann, on Occidental's letterhead, forwarding the June 5, 1967 proxy to Tenneco's counsel.

On remand, appellees can and will prove that Mr. Brown assured Tenneco that, although Occidental was unwilling to make the proxy a condition of the option agreement, he would vote Occidental's Kern shares in favor of the Tenneco acquisition.** Subsequently, following institution of litigation in the California state courts accusing Occi-

---

* The other point upon which the *Bershad* option is distinguished is the resignation of directors there. As we pointed out in our brief on appeal (pp. 6, 61), Occidental, which then had no directors on Old Kern's board, had demanded by letter dated May 27, 1967 the election of two designees to Old Kern's board (671a). Such demand was not pursued following the June 2, 1967 option agreement.

** In its briefs here, as in the district court, Occidental, which issued the proxy and well knew of its existence, denied the existence of any agreement with respect to how its Old Kern shares would be voted (Occidental Br., pp. 21, 75; Reply Br., p. 26). Rather than generate a factual dispute which might well persuade the Court that summary judgment in its favor was inappropriate (and not being faced with a cross-motion by Occidental), New Kern contended that the Court need not find the existence of a proxy in order for it to prevail (Appellees' Br., p. 61).

dental of "vote selling", Mr. Brown asked to be relieved of his undertaking. This was consented to by Tenneco only when it became apparent that Occidental's vote was not needed to provide the 50% affirmative vote necessary to approve Tenneco's acquisition of Old Kern. Instead, it was agreed that Occidental would submit a letter, to be read at the Old Kern stockholders meeting, setting forth its lack of opposition to the transaction (458a).

This Court's opinion also relies in its treatment of the option upon "undisputed testimony that the forfeitable down payment, 10.05%, was a reasonable, non-coercive price . . ." (Slip Op. 79). The only such testimony was hearsay testimony given in a deposition by Mr. Walter Davis of Occidental in which he recited what someone from the firm of Donaldson, Lufkin & Jenrette allegedly told him (747a-748a).* Because appellees did not believe it necessary to rebut this hearsay opinion testimony in order to prevail upon their motion for summary judgment, the source of that opinion was never deposed. Such hearsay testimony would be of dubious admissibility at trial, but even if admissible should surely be the subject of cross-examination of the source, and is certainly subject to rebuttal by expert testimony. In other words, whether or not the $8,866,230 option price was "reasonable" and "non-coercive" has now become a critical factual issue which clearly calls for full discovery and trial rather than summary disposition on the basis of hearsay deposition testimony.

So, too, the whole question of the intention of the parties with respect to whether the option was a sale should be explored in a plenary trial. As New Kern demonstrated in its original brief (p. 6), Occidental initially offered to

* Moreover, Mr. Davis' testimony was merely to the effect that he had made inquiry as to an appropriate price for a six-month call on a stock selling for $95. There was no indication that Donaldson, Lufkin & Jenrette was informed of the magnitude of the block of stock in question nor of the other terms and conditions (747a-748a).

sell out its position in Old Kern but entered into the option agreement upon advice of counsel in an effort to avoid the impact of Section 16(b). Tenneco stands ready to prove that there was never any real doubt that the option would be exercised. Again, intention of the parties, which is surely relevant to the question of whether or not the option was "in truth and fact a sale", is a fact issue which should be disposed of at trial, following full discovery.

In the context of the issues as presented to Judge Palmieri, before whom Occidental requested a trial, appellees' failure to emphasize the factual disputes between the parties was, we respectfully submit, understandable. Unfortunately, however, the result of this failure was a consequent inability to dispute in this Court certain of the factual conclusions asserted by Occidental on which the Court's opinion so heavily relies. While we regret the necessity for the present application, we nevertheless believe that the interests of justice now require us to fully apprise the Court of the facts demonstrating that its prior decision was based on an incomplete record and should therefore be re-examined.

Accordingly, appellees respectfully urge that rehearing be granted and that upon such rehearing the matter be remanded for further proceedings in the district court.

II.

The Court erred in holding that the exchange of securities was not a sale.

The Court's opinion here, we submit, represents the first occasion upon which any court has found that an exchange of the securities of one company for those of an entirely separate and distinct company do not constitute a "sale" for purposes of Section 16(b). In reaching this decision, the Court notes that a recent decision of this Court in *Newmark* v. *RKO General, Inc.* holds that "an exchange

pursuant to a merger *may be* a 'sale'" (emphasis the Court's), but confines the holding of that case to "the particular exchange there at issue" (Slip Op. 77).

For reasons previously argued in appellees' brief on the appeal, we believe that Occidental had knowledge and power to control events similar to that of RKO General. But, even if that were not so, we respectfully submit that this Court's limitation of the *Newmark* decision to its particular facts is unwarranted.

The inherent possibilities of speculative abuse and profits in the tender offer situation were noted by the then Chairman of the Securities and Exchange Commission in *Hearings Before the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (on H.R. 14475 and S. 510, at p. 22, July 1, 1968).

> "There has been enough experience in the past 2 years for any sophisticated takeover bidder to know that, unless management joins him, management will seek another partner and that other partner probably will make a slightly better offer. We have the feeling that many of these people are doing it for the short-term gain, or, to use the vernacular, to make a fast buck. We have a number of variants of that. We have a situation where almost overnight [a] particular individual or company made several millions of dollars in a situation of this kind.
> "We have the feeling that some of these offers are made only to initiate that activity."*

Instead, the Court here expressed concern over the "equity" of depriving the unsuccessful tender offeror of its short-swing profits and expressed fear that imposition of Section 16(b) liability "would operate to discourage tender offers for more than 10% of a company's stock" (Slip Op. 78).

---

* The Court did not ask the Commission for a brief setting forth its views with respect to the issues presented by this appeal although the opinion notes that the Commission was asked by Occidental to promulgate a rule in this area but refused to act (Slip Op. 72).

We respectfully submit that the teaching of the *Newmark* case was correctly applied by Judge Lasker in the district court in an opinion filed October 12, 1971 in *American Standard, Inc.* v. *Crane Co.*, 68 Civ. 2461 (S.D.N.Y.), a case involving the basic elements presented here—(a) an attempted take-over by purchase of stock, including a tender offer, (b) opposition of the target company, followed by (c) a merger between the target company and a different partner. In finding that the exchange of shares occurring by reason of the merger was a "sale" under the *Newmark* case, Judge Lasker stated:

> "It is true that the Court—properly—placed emphasis on the facts that RKO controlled Frontier, had knowledge of the merger, and had a contract right to cancel the agreement, and that its option to purchase Central securities at a fixed price put it in ideal position to profit from an anticipated rise in the price of the stock—facts not present in the instant case. However, exceptional as such facts are, at least in combination, they were not elements sine qua non to the finding. Rather, they merely underpinned, although emphatically, the opportunity for speculative abuse which there existed.
>
> "Here Crane, although it did not possess the array of control powers exercisable by RKO, nevertheless knew that the probabilities were, from the time of Air Brake's rejection onward, that Air Brake would 'seek another partner and that other partner' would 'probably . . . make a slightly better offer'. After March 4 it knew this to a certainty and, although it quite rightly points out that it could not have anticipated Standard's manipulation of April 19, it nevertheless purchased over 490,000 shares of Air Brake in a period more than a month thereafter.
>
> "Furthermore, aside from the fact that any party in Crane's position could reasonably have inferred from the dynamic pattern of take-over fights that it would either win control or be in a strong position to sell at a profit, there were also significant ways in which Crane could influence the course of events.

> For example, it could easily affect the exchange ratio of the merger by the terms of its own tender offer. It controlled the timing of its offer and had the opportunity to improve it with resultant effect on the ultimate terms of merger between Air Brake and Standard.

Here, Occidental, having been rejected previously by Old Kern (Slip Op. 68), knew at all times "that the probabilities were" that Old Kern would "seek another partner" which would "probably . . . make a . . . better offer". Moreover, on May 10, 1967, the day that Occidental extended its offer to encompass another 500,000 shares of Old Kern shares, Old Kern announced that it then had "a number of offers from strong and reputable corporations to discuss merger possibilities—mergers that could result in tax-free exchanges of stock" (783a).

Not surprisingly, on October 15, 1971, two days after this Court's opinion was filed here, Judge Lasker withdrew his opinion in the *American Standard* v. *Crane Co.* case. We respectfully submit, however, that his opinion, like Judge Palmieri's opinion here, represents the correct interpretation of and application of this Court's teaching in *Newmark* v. *RKO General, Inc.* and that upon rehearing this Court should adhere to that interpretation.

III.

The Court erred in holding that the option was not a sale as a matter of law.

Although recognizing that an option to sell falls within the statutory definition of "sale" set forth in § 3(a)(14) of the 1934 Act, the Court holds that "the mere grant of an option to purchase is not a sale for purposes of § 16(b)". In reaching this result, the Court relies upon *Silverman* v. *Landa*, 306 F.2d 422 (2d Cir. 1962), which for reasons dis-

cussed in appellees' brief (p. 58), we believe to be completely inapposite.

In contrast, in *Bershad* v. *McDonough, supra,* which like the present case involved the sale of an option within six months of the purchase of the stock in question, the Seventh Circuit, although finding in the alternative that the facts there were sufficient to characterize the option as a disguised sale, held in the first instance that the sale of an option, *qua option,* was a device "well adapted to speculation and abuse of inside information" and thus a "sale" of the underlying security within the meaning of Section 16(b).

The opinion here attempts to distinguish the *Bershad* decision on its facts, concluding that there is "no conflict between the *Bershad* decision and what we rule here, although we would not be understood as necessarily agreeing with everything said in the court's opinion" (Slip Op. 81). In fact, we submit, the *Bershad* ruling is in square conflict with the ruling here. In contrast to this Court's holding that "the mere grant of an option to purchase is not a sale for purposes of § 16(b)" (Slip Op. 79), the Seventh Circuit stated:

> "The insider's sale of options in his stock is well adapted to speculation and abuse of inside information whether or not the option is subsequently exercised. The sale of the right to purchase the underlying security is itself a means of realizing a profit from that security. The right to purchase stock at a given price under specified circumstances, although clearly not identical to the rights attendant upon ownership of the stock itself, derives from and is dependent upon the value of the underlying security. *Sale of such purchase rights provides an easy vehicle for the use of inside information in extracting profits from the stock itself.* Where the option is ultimately exercised, moreover, the exact date of exercise may be unimportant to the substance of the transaction from the point of view of the insider-vendor, since he can exploit his position in the corporation by set-

> ting the terms of sale in the option. In addition, parties frequently provide that the option price shall be considered a retroactive down payment of the purchase price of the stock sold upon exercise of the option. Under such circumstances, it may be reasonable to hold the parties to their own treatment of the transaction and date the 'sale' of the stock at the purchase of the option rather than its exercise." (*Emphasis added*)

The Court's opinion here gives every insider, be he a 10% beneficial owner, officer or director, an "escape hatch" from the strict and uncompromising prohibitions imposed upon him by Section 16(b). The opinion leaves him free (so far as 16(b) is concerned) to purchase stock on the basis of inside information and then, once the price of the underlying security has risen, to reap a speculative profit by selling an option at a price and upon terms which reflect the increased price. Although the insider selling an option need not necessarily reap the same profit that he would realize from an outright sale, this is no reason for freeing him from 16(b) liability. Noting this possibility, the Seventh Circuit stated:

> "[T]he possible distinctions do not indicate that the insider here may not speculate with the special information he acquires, but only that his ability to maximize his profits from such utilization of inside information is somewhat diminished." (428 F.2d at 698, fn.)

Here, in contrast, the Court seemed to feel that the mere possibility of non-exercise of the option was enough to exempt it from being a "sale" for Section 16(b) purposes. In fact, the option here was indeed exercised at a profit to Occidental of nearly $18 million. Moreover, this reasoning ignores the fact that non-exercise (assuming there was any realistic possibility of it) would have left Occidental with a nearly $9 million profit by reason of the option price alone.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that rehearing or, in the alternative, rehearing in banc should be granted.

Dated: New York, New York
October 27, 1971

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL & OHL
Attorneys for Appellees
Kern County Land Company ("New Kern"), Tenneco Inc. and Tenneco Corporation
80 Pine Street
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WHitehall 4-7400

Of Counsel:

F. ARNOLD DAUM
DAVID R. HYDE

PROXY

Albert J. Brown, with full power of substitution, hereby authorized to vote all of the capital stock of rn County Land Company owned by the undersigned at any ecial meeting of shareholders of Kern County Land Company ld in 1967 and is specifically authorized to vote in favor the proposed sale of the assets of Kern County Land Compa a wholly-owned subsidiary of Tenneco Inc.

OCCIDENTAL PETROLEUM CORPORATION

By _____
Executive Vice President

ted: June 2, 1967

520a

OCCIDENTAL PETROLEUM CORPORATION
10889 WILSHIRE BOULEVARD, SUITE 1500
LOS ANGELES, CALIFORNIA 90024

•

879-1700 - 477-8521

June 5, 1967

F. Arnold Daum, Esquire
Cahill, Gordon, Sonnett, Reindel & Ohl
80 Pine Street
New York, New York 10005

Dear Mr. Daum:

The attached proxy is in substitution for the proxy execut
by Mr. Walter R. Davis on June 2, 1967.

Yours very truly,

Bruce Mann

BM:hb
Attachment

P R O X Y

ALBERT J. BROWN, with full power of substitution, hereby authorized to vote all of the capital stock of Kern County nd Company owned by the undersigned at any special meeting of areholders of Kern County Land Company held in 1967, and is ecifically authorized to vote in favor of the proposed sale of the sets of Kern County Land Company to a wholly owned subsidiary TENNECO INC.

Occidental Petroleum Corporation

By Walter R. Davis
Walter R. Davis
Executive Vice President

By
Paul C. Hebner, Secretary

ted: June 5, 1967

Supreme Court of the United States

No. 71-1059 ~~, October Term, 19~~

Kern County Land Company,

Petitioner,

v.

Occidental Petroleum Corporation

ORDER ALLOWING CERTIORARI. Filed April 17 ----------, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ----------Circuit is granted.

FEB 17 1972
E. ROBERT SEAVER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1059

KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID R. HYDE,
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Of Counsel:

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WILLIAM E. HEGARTY,
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New York, New York 10005.

February 17, 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the present Kern County Land Company ("New Kern"), prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit. In an action under Section 16(b) of the Securities Exchange Act of 1934, the court of appeals (a) reversed the district court's entry of summary judgment against defendant Occidental Petroleum Corporation ("Occidental") in the amount of $23,511,337.94, representing profits (including dividends) and interest realized by Occidental in the purchase and disposition of a more than 20% interest in the common stock of petitioner's predecessor, the former Kern County Land Company ("Old Kern"), and (b) instead remanded with instructions to

enter judgment dismissing the complaint, although such relief had not been sought by Occidental below.

Opinions Below

The decision of the court of appeals of which review is sought is reported at 450 F.2d 157 (1A)*. The decision of the district court which was reversed by the court of appeals is reported at 323 F. Supp. 570 (1C).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 13, 1971 (1B). A timely petition for rehearing or, in the alternative, rehearing in banc was filed on October 27, 1971. Such petition was denied on November 19, 1971 with Judge Hays noting his dissent from the denial of rehearing in banc (3B, 4B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a statutory insider's sale of an option with respect to over 20% of a class of securities, in return for an $8,866,230 cash payment, within a month after it had purchased such securities, is a "sale" of such securities under Section 16(b)?

2. Whether a statutory insider's exchange of a more than 20% interest in a class of securities for securities of an entirely different company, at a profit to the insider of some $18 million, less than six months after such securities had been purchased in a cash tender offer, is a "sale" of such securities under Section 16(b)?

* Citations with the suffix "A" "B" or "C" are to pages of the Appendix hereto.

Statute Involved

Section 3(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a), provides in pertinent part:

> "When used in this chapter, unless the context otherwise requires—
>
> • • • • •
>
> "(14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), provides in pertinent part:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner,* director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months • • • shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. • • • This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

* The term "such beneficial owner" relates back to Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(a), which provides for the reporting of beneficial ownership of equity securities and changes in such ownership by, among others, "[e]very person who is directly or indirectly the beneficial owner of more than 10 percentum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12" of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*. The Old Kern securities involved in this action were so registered.

The Facts

Occidental's Purchase of Old Kern Shares

On Monday, May 8, 1967, Occidental publicly announced that it was making a cash tender offer to purchase up to 500,000 shares (an amount in excess of 10% of those outstanding) of Old Kern common stock at $83.50 per share. By May 10, 1967, two days after Occidental's tender offer was first announced, more than 500,000 shares of Old Kern stock had been tendered to Occidental (450a-1, 764a*), and on May 11, 1967, Occidental announced an amendment of its tender offer to cover an additional 500,000 shares (452a). Prior to the close of its offer on June 8, 1967, Occidental purchased a total of 885,649 shares as a result thereof (over 20% of those outstanding) at a total cost of $75,280,165 (407a, 1075a).

The Tenneco-Old Kern Agreement

Following Occidental's announcement of its tender offer, Old Kern's management entered into discussions with various companies, including Tenneco Inc. ("Tenneco") and Occidental itself, with a view to possible corporate combination (645a). On May 19, 1967, Old Kern's Board of Directors approved an offer by Tenneco under which Tenneco was to acquire Old Kern's business and assets in exchange for shares of a new Tenneco Convertible Preference Stock to be distributed to Old Kern shareholders in exchange for their Old Kern common stock. Old Kern's acceptance of the Tenneco offer was announced the same day (641a-649a). Occidental appraised the Tenneco stock at $105 per share and its President, Dr. Armand Hammer issued a statement dated the same day, Friday, May 19, 1967, to Occidental stockholders announcing an indicated

* Citations with the suffix "a" are to pages of the Joint Appendix filed with the court of appeals, a certified copy of which has been filed in this Court.

"profit to your company of about $18 million . . ." (710a, pp. 6-7).

The Occidental Option Agreement

On the following Monday, May 22, 1967, Occidental made written demand upon Old Kern for an inspection of its list of shareholders, books of account, minutes of stockholder, board of directors and executive committee meetings, together with all records, books and documents referred to therein (668a). On Thursday, May 25, 1967, Occidental filed a petition in the California Superior Court demanding inspection of such documents (849a).

Prior to the return date of its petition, Occidental, describing itself as "the principal stockholder of Kern County Land Company", made a further written demand upon Old Kern calling for inspection of numerous additional books and records, as well as "the election of at least two (2) persons to be designated by Occidental to the board of directors" (671a). This demand was followed by the filing of a second court petition on May 31, 1967, alleging Occidental's status as owner of more than 10% of Old Kern's common stock and asserting that it needed such inspection in order to determine whether or not "to oppose" the Tenneco-Old Kern transaction, citing the time needed "to prepare proxy soliciting material" and to "file preliminary copies of such proxy soliciting material with the Securities and Exchange Commission" (858a, 861a). Prior to any court ruling on Occidental's petitions, Old Kern voluntarily permitted a team of up to five Occidental lawyers and accountants to inspect Old Kern's general ledger, consolidated financial statements, consolidating journal entries, details of cash receipts from oil operations, supporting trial balances and other records over a six-day period (650a).

In the interim, on May 23, 1967, Occidental's Executive Vice President, Mr. Walter R. Davis, requested a meeting

with Mr. Gardiner Symonds, then Chairman of the Board and chief executive officer of Tenneco (584a). This meeting took place on May 30, 1967, the Memorial Day holiday, at Mr. Symonds' home in Houston, Texas. According to Mr. Davis' deposition testimony:

> "I went in and after just miscellaneous conversation, I told Mr. Symonds that I felt like Occidental did not want to get into a proxy fight with Tenneco or a fight in the Kern County situation and that I had been authorized by Dr. Hammer to discuss with him the possible purchase of our stock . . ." (Davis Dep., pp. 32-33).

The initial meeting between Mr. Davis and Mr. Symonds was followed by meetings between them in New York on June 1 and 2, 1967, at which the parties were also represented by counsel. At these meetings, Occidental's attorneys proposed that the parties enter into an option agreement exercisable after December 9, 1967 (six months plus one day after the closing date of Occidental's tender offer), giving Tenneco an option to purchase at $105 per share 886,623 shares of Tenneco Preference Stock which Occidental would receive in exchange for its Old Kern common stock upon consummation of the Tenneco-Old Kern agreement (585a). The cost of this option was to be $10 per share, or a total of $8,866,230 to be credited against the aggregate purchase price of $93,095,415 upon exercise of the option. A formal written option agreement between Occidental and Tenneco Corporation (a subsidiary of Tenneco Inc.) was prepared. It provided that, if the closing of the Tenneco-Old Kern agreement did occur, Occidental would retain the $8,866,230 which it had received even though Tenneco failed to exercise its option (461a, *et seq.*).

On Friday, June 2, 1967, the Option Agreement was executed on behalf of Tenneco and Occidental. On the same day, Occidental publicly announced that it would not oppose Tenneco's proposed acquisition of Old Kern (712a-713a),

and gave its attorney, Mr. Albert J. Brown, of the San Francisco firm of Pillsbury, Madison & Sutro, a proxy to vote its Old Kern shares specifically authorizing him "to vote in favor of the proposed sale of the assets of Kern County Land Company to a wholly-owned subsidiary of Tenneco Inc." Mr. Brown in turn assured Tenneco's counsel that he would vote Occidental's Old Kern shares in favor of the Tenneco acquisition.* Occidental also thereafter voluntarily dismissed its pending legal actions for production of Old Kern books and records (700a, 709a), and abandoned its demand for seats on Old Kern's Board.

Upon the execution of the Option Agreement on June 2, 1967, Tenneco paid Occidental $886,623 by check and a week later transmitted the rest of the total $8,866,230 option price (416a).

Occidental's Efforts to Secure an SEC Rule

On the Monday following execution of the Option Agreement, June 5, 1967, Occidental's attorneys sent Tenneco's counsel a copy of a proposed Rule 16(b)-11 which Occidental had asked the Securities and Exchange Commission to adopt (433a, 512a). This proposed rule would have exempted from the operation of Section 16(b) the "disposition . . . pursuant to a merger or consolidation" of securities by a beneficial owner of more than 10%, provided the beneficial owner (a) had acquired them in a public tender offer and (b) continued to hold the security acquired by him in the merger more than six months after his purchase of the original security (512a).** The next day, June 6,

* The foregoing proxy and Mr. Brown's assurances were not part of the record before the district court and the court of appeals, but were brought to the court of appeals' attention by the petition for rehearing which pointed out that discovery below had not been completed and that there were additional facts which could be elicited at a trial and which precluded the grant of summary judgment in favor of Occidental.

** The language of the exemption urged upon the Commission by Occidental concedes that a disposition of securities in a merger or sale of assets is a "sale" under Section 16(b).

1967, Occidental's counsel, Mr. Brown, wrote to Tenneco's counsel concerning the proposed rule (571a-572a). Mr. Brown's letter referred to a telephone conversation he had had the previous day with Mr. Philip Loomis, then General Counsel of the Securities and Exchange Commission, "to discuss the proposed rule that the SEC was considering to give Occidental some relief in the situation in which it found itself". Mr. Brown stated:

> "As we had proposed the rule and, as we had understood from Myer Feldman [Occidental's Washington counsel], we were going to be granted an exemption at both ends."

Mr. Brown's letter further noted that if a rule were not adopted, the "only alternative" Occidental would have would be "to commence every kind of litigation it could reasonably bring and attempt to stall the consummation of the Tenneco-Kern transaction for six months".* Mr. Brown noted that "[o]bviously this would be disadvantageous to the other Kern stockholders".

On July 12, 1967, the Commission advised Occidental's counsel that "the Commission considers it undesirable to publish for comment any proposed rule in this area at the present time" (523a). Occidental persisted in its efforts to obtain a rule from the Commission and on August 29, 1967 the full Commission heard argument in support of a modified and more restricted version of Occidental's proposed rule (435a, 531a) and later considered a 30-page letter from Occidental's counsel in further support of its proposed rule (534a). Nevertheless, the Commission refused to

* A whole series of purported stockholder suits attempting to block the Tenneco-Old Kern transaction did subsequently materialize. These are reviewed in detail in the opinion of the District Court for the Northern District of Texas in *600 California Corp.* v. *Harjean Co.*, 284 F.Supp. 843 (N.D. Tex. 1968), in which the court concluded that "somebody with a lot more at stake and a much stronger motive for delaying the closing than these named plaintiffs was furnishing an almost unlimited expense account to finance this weird pattern of delaying actions." (284 F.Supp. at 861.)

modify its earlier decision not to take action and no such rule was ever adopted.

The Closing of the Tenneco-Old Kern Transaction

Tenneco's acquisition of the business and assets of Old Kern was embodied in a formal Agreement and Plan of Reorganization between Tenneco, Old Kern and New Kern (a newly organized Delaware corporation formed by Tenneco to receive the business and assets of Old Kern) (456a). This Agreement, which provided for the exchange of Tenneco Preference Stock for Old Kern common stock by Old Kern shareholders, was approved by the Old Kern shareholders at a meeting held on July 17, 1967.

On August 30, 1967, the closing of the Tenneco-Old Kern agreement was held. Old Kern transferred its assets and business to New Kern and received shares of Tenneco Preference Stock, which it deposited with the Exchange Agent "with irrevocable instructions for distribution of such shares to the Kern shareowners upon receipt of their Kern stock certificates for cancellation" (485a). Thereupon, Old Kern's stockholders, including Occidental, ceased to own any interest in Old Kern as an independent operating company, and their Old Kern stock certificates became evidence only of their beneficial ownership of shares of Tenneco Preference Stock (410a-411a). On October 6, 1967, Old Kern was formally dissolved pursuant to California law (413a-414a).

On December 11, 1967, a closing was held under the Option Agreement in Nassau, Bahamas, at which time $84,229,185 was credited to Occidental's accounts at various banks. With this amount, plus the $8,866,230 which had been paid to it in June, Occidental received $93,095,415 with respect to its Old Kern stock (414a). With respect to the 885,649 shares purchased pursuant to its tender offer, this represented a $17,712,980 profit (421a). In addition, Occidental

received two dividends totaling $1,797,124.23, which, when added to the $17,712,980 profit realized on Occidental's sale of stock, come to a total profit of $19,506,419.22 realized by Occidental by reason of its acquisition and disposition of its 20% beneficial interest in Old Kern (415a).

The Proceedings Below

In October 1967, following the institution of two actions on behalf of Old Kern stockholders, New Kern, as assignee of Old Kern, filed this action pursuant to Section 16(b) for recovery by it of Occidental's short-swing profits. These actions, and a third Old Kern stockholder action subsequently instituted, were consolidated for purposes of pretrial discovery. 44 F.R.D. 543 (S.D.N.Y. 1968).

Following certain limited discovery directed to establishing the grounds for a summary judgment motion by plaintiffs, New Kern moved for summary judgment on the basis of the undisputed facts elicited thus far. Such motion was granted by the district court. On appeal, the court of appeals not only reversed the judgment below but further directed entry of judgment in favor of Occidental.

Reasons for Granting the Writ

The reversal by the court of appeals of the district court's judgment against Occidental in the amount of $23,511,337.94, with instructions to dismiss the complaint (relief not even sought by the defendant in the district court), leaves intact Occidental's admitted profit of some $18 million, exclusive of dividends and interest, derived from its purchase and subsequent disposition of a more than 20% beneficial interest in the common stock of Old Kern. To reach such result, the court of appeals ignored the "mechanical quality" of the statute (*Reliance Electric*

Co. v. *Emerson Electric Co.*, U.S. (1972), Slip Op., p. 7) and defined the statutory term "sale" narrowly so as to exclude not only Occidental's sale of an option but also the subsequent exchange of Old Kern shares for Tenneco shares—both of which events occurred less than four months after Occidental purchased over 20% of Old Kern's common stock.

By holding that the sale of an option is not a "sale" under Section 16(b), the court of appeals opens up a new method of evasion, the option device, to any insider, be he officer, director or beneficial owner, who wishes to make short-swing profits without forfeiting those profits in a Section 16(b) action. Such holding is in conflict with a recent decision of the Court of Appeals for the Seventh Circuit, *Bershad* v. *McDonough*, 428 F.2d 693 (7th Cir. (1970), *cert. denied*, 400 U.S. 992 (1971), a decision recently cited with approval by this Court in the *Reliance* case.

Secondly, in further holding that, under the particular circumstances presented, the exchange of Old Kern securities for Tenneco securities was not a "sale" under Section 16(b) (the first occasion on which any court has ever held that an exchange of the securities of one company for those of an entirely separate and distinct company did not constitute a "sale" under Section 16(b)), the court of appeals opened up a further avenue for the realization of short-swing profits, particularly significant in the tender offer situation. If not corrected by this Court, the holding below will undoubtedly control pending and future litigation in this important area of federal concern.*

* A district court decision filed October 12, 1971, the day before the court of appeals' decision here, holding that an exchange of stock was a "sale" and finding the unsuccessful tender offeror liable under Section 16(b) in an almost identical situation, was withdrawn on October 15, 1971 in view of the decision here. *American Standard, Inc.* v. *Crane Co.*, CCH Fed. Sec.L.Rep. ¶ 93,237 (S.D.N.Y.).

I.

The Occidental "option" was a "sale" under Section 16(b).

Although "recognizing that, under the statutory definition, §3(a)(14) [of the 1934 Act], 'sale' includes 'contract to sell'" and that "an option entitling the optionee to purchase is a contract to sell in a dictionary sense", the court of appeals nevertheless held it to be the rule "in this circuit" that the "mere grant of an option to purchase is not a sale for purposes of §16(b)" and that a sale "occurs only when the optionee exercises the option" (13A).

In formulating such a rule, the court of appeals did not undertake any examination of the speculative possibilities inherent in an insider's short-swing sale of an option. In failing to make such inquiry, the court ignored long established criteria for the construction of Section 16(b). As this Court recently noted in *Reliance Electric Co.* v. *Emerson Electric Co., supra.*:

> "In interpreting the terms 'purchase' and 'sale', courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse. See, *e.g., Bershad* v. *McDonough,* 428 F. 2d 693 (CA7 1970) (granting of an option to purchase constitutes a 'sale'). (Slip Op. 7 fn.)

In the *Bershad* case, in contrast to the holding of the court of appeals here that the "mere grant of an option to purchase is not a sale for purposes of §16(b)" and that a sale occurs "only when the optionee exercises the option" (13A), the Court of Appeals for the Seventh Circuit analyzed the speculative possibilities inherent in an insider's sale of an option and concluded:

> "The insider's sale of options in his stock is well adapted to speculation and abuse of inside informa-

tion *whether or not the option is subsequently exercised.* The sale of the right to purchase the underlying security is itself a means of realizing a profit from that security. The right to purchase stock at a given price under specified circumstances, although clearly not identical to the rights attendant upon ownership of the stock itself, derives from and is dependent upon the value of the underlying security. *Sale of such purchase rights provides an easy vehicle for the use of inside information in extracting profits from the stock itself."* (Emphasis added) (428 F.2d at 698)

The opinion below attempted to confine the *Bershad* decision to its alternative holding that the facts there were sufficient to characterize the option as a disguised sale, and concluded that there is "no conflict between *Bershad* and what we rule here, although we would not be understood as necessarily agreeing with everything said in the court's opinion" (15A). This treatment of *Bershad* ignores the fact that the Court of Appeals for the Seventh Circuit held in the first instance that the sale of an option, *qua option,* is a device "well adapted to speculation and abuse of inside information" and may thus be a "sale" of the underlying security within the meaning of Section 16(b). It further ignores, as was demonstrated in New Kern's Petition for Rehearing, the factual identity of the two cases.

In the *Bershad* case, the defendants purchased approximately 18% of the outstanding shares of Cudahy Company common stock on March 15 and 16, 1967 at $6.75 per share. Some four months later defendants entered into an option agreement under which they were obligated to sell the bulk of these shares at $9 per share on or before October 1, 1967; the optionee paid $350,000 (14% of the purchase price) for the option to be applied against the purchase price in the event of exercise and, in the event of non-exercise, to be

retained by the defendants. At the same time, the defendants gave the purchaser a proxy with respect to the optioned stock, irrevocable until October 1, 1967. Defendant McDonough and his colleagues then resigned as Cudahy directors in favor of nominees of the option purchaser. The purchaser indicated its intention to exercise the option on September 22, 1967, six months and six days after defendants' purchase, and the shares were delivered five days later. On these facts the Seventh Circuit, affirming a grant of summary judgment to plaintiff, concluded that "the stock was effectively transferred, for all practical purposes, long before the exercise of the option" (428 F.2d at 698).

In the present case, the option price amounted to almost $9 million (25 times the amount in *Bershad*), was nearly 10% of the total $93,095,415 purchase price, was to be applied to the purchase price upon exercise of the option, and was to be forfeited if the option were not exercised, leaving little if any possibility of non-exercise. The execution of the option was also accompanied by the giving of a proxy to Occidental's attorney in which he was "specifically authorized" to vote in favor of Tenneco's acquisition of Old Kern and by his assurance to Tenneco, in turn, that the Occidental proxy would be so voted. While there was no resignation of directors (Occidental had no representatives on the Old Kern board), Occidental's pending demand for two seats on Old Kern's board was abandoned, as was its pending litigation for inspection of Old Kern's books and records. In short, the Occidental "option" was in fact just as much a sale as of the date it was entered into as the "option" in the *Bershad* case. However, while the Court of Appeals for the Seventh Circuit affirmed a grant of summary judgment against the defendant, the court of appeals here directed summary judgment in favor of defendant

Occidental, although such relief had not even been sought below.*

The court of appeals' opinion here gives every insider, be he a 10% beneficial owner, officer or director, an "escape hatch" from the strict and uncompromising limitations imposed upon him by Section 16(b). The opinion leaves him free to purchase stock and to reap a short-swing speculative profit upon it by selling an option at a price and upon terms which reflect his access to inside information. As a result of the court of appeals' decision here, there is every reason to expect that insiders (unless they are in the Seventh Circuit) will resort to the option device with increasing frequency as a means for realizing speculative profits.

Granted, the insider selling an option need not necessarily reap the same profit that he would realize from an outright sale, but this is no reason for freeing him from

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* Occidental asked the district court "to deny plaintiffs' motions for summary judgment pending a full trial on the merits" (721a). On its appeal, Occidental asserted in one sentence of its 122-page brief that the district court "should have granted summary judgment to Occidental or proceeded to trial on the merits", noting in a footnote that the court had power to grant judgment in its favor despite Occidental's failure to move for such relief. The point was not pressed and petitioner made no response to it since it did not appear to be seriously urged. Although the court of appeals' opinion asserts that "inquiry at the argument failed to reveal any new facts that might be adduced by them [petitioner] at an evidentiary hearing", none of petitioner's counsel present at the argument recall any inquiry as to what further facts they might adduce at a hearing. In granting summary judgment in Occidental's favor, and thereby resolving in its favor the question of whether or not the option was "in truth and fact a sale" (14A), the court of appeals disregarded its own admonition in *Schoenbaum* v. *Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969), against the granting of summary judgment for defendant in stockholder actions where often "there will be issues as to the knowledge, intent and motive which will require a full trial with an opportunity to observe the demeanor of the witnesses, and to conduct cross-examination in open court" (citing this Court in *Poller* v. *CBS*, 368 U.S. 464 (1962)).

Section 16(b) liability. Noting this possibility, the Court of Appeals for the Seventh Circuit stated in its *Bershad* opinion:

> "[T]he possible distinctions do not indicate that the insider here may not speculate with the special information he acquires, but only that his ability to maximize his profits from such utilization of inside information is somewhat diminished." (428 F.2d at 698 fn.)

Here, in contrast, the Court of Appeals seemed to feel that the mere possibility of non-exercise of the option was enough to exempt it from being a "sale" for Section 16(b) purposes. In fact, the option here was indeed exercised at a profit to Occidental of nearly $18 million. Moreover, this reasoning ignores the fact that non-exercise (assuming there was any realistic possibility of it) would have left Occidental with a nearly $9 million profit by reason of the option price alone, which profit should certainly be subject to recovery in a Section 16(b) suit.

II.

Alternatively, the Exchange of Kern Shares for Those of Tenneco Was a "Sale" Under Section 16(b)

Apart from its holding with respect to the option, the court of appeals further held that the August 30, 1967 exchange of Old Kern shares for Tenneco shares (which occurred less than four months after Occidental's purchase of its 20% interest in Old Kern) was not a "sale" by Occidental under Section 16(b). In this respect, the court of appeals promulgated an exemptive rule for tender offerors which, ironically, is far broader than the restricted tender

offer rule which Occidental urged so vigorously (and unsuccessfully) upon the SEC in the summer of 1967.*

The opinion below notes that this case "raises important questions with respect to the problems under §16(b) of the Securities Exchange Act that may be encountered by the maker of a tender offer who finds himself outflanked by a 'defensive merger'. . . ." The court of appeals resolves those questions by expressing doubt over the "equity" of depriving the defeated tender offeror of its short-swing profits and by expressing concern that imposition of Section 16(b) liability "would operate to discourage tender offers for more than 10% of a company's stock" (13A).

Such concern and solicitude for the defeated tender offeror is in sharp contrast to the views expressed by the then Chairman of the Securities and Exchange Commission in hearings before the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (on H.R. 14475 and S. 510, at p. 22, July 1, 1968).** Noting the inherent possibilities of speculative abuse and profits in the tender offer situation the Chairman testified:

> "There has been enough experience in the past 2 years for any sophisticated takeover bidder to know that, unless management joins him, management will seek another partner and that other partner probably will make a slightly better offer. We have the feeling that many of these people are doing it for the short-term gain, or, to use the vernacular, to make a fast buck. We have a number of variants of that. We have a situation where almost overnight

* The court of appeals speculates that the "Commission may have thought the rule unnecessary or undraftable" or "the time inappropriate" (6A fn.). The court does not refer to the equally real possibility that the Commission thought such a rule would be contrary to the purposes of Section 16(b).

** The court of appeals did not ask the Commission for a brief setting forth its views with respect to the issues presented by the appeal.

> [a] particular individual or company made several millions of dollars in a situation of this kind.
>
> "We have the feeling that some of these offers are made only to initiate that activity."

In giving the above testimony, the Chairman could well have had Occidental in mind. As an article on tender offers, in the August 1967 issue of Fortune states:

> "[W]hile Occidental failed to win control of Kern, it could look forward to a gross capital gain of more than $17 million on the Kern shares it had acquired. 'That', Armand Hammer [Occidental's President] observes, 'isn't bad for two weeks' work.'" (p. 109)

In the recent *Reliance Electric Co.* v. *Emerson Electric Co.* case, *supra*, Emerson, given the decision of the court of appeals here, would not have felt it necessary to dispose of any of its Dodge holdings prior to Reliance Electric's merger with Dodge. As this Court noted in its opinion, Emerson, which like Occidental had acquired its stock position in a cash tender offer, had encountered "certain failure" in its efforts to take over Dodge and was faced "with the prospect of being forced to exchange its Dodge shares for stock in the merged corporation in the near future". Emerson wanted to "immunize" a portion of those shares from liability under Section 16(b). Its concern about Section 16(b) liability was understandable. As this Court noted in a footnote to its opinion:

> "The Court of Appeals for the Second Circuit has held that an exchange of shares in one corporation for those of another pursuant to a merger agreement constitutes a 'sale' within the meaning of § 16(b). *Newmark* v. *RKO General, Inc.*, 425 F.2d 348, 354 (CA2 1970)." (Slip Op., p. 2)

Now, however, given the opinion here, Emerson would have no cause for concern, since the court of appeals exempts

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the insider in Emerson's situation from the rule set forth in the *Newmark* case.

In this holding, the court of appeals again, as in its holding with respect to the sale of the option by Occidental, bent over backwards to restrict the statutory term "sale" to what it characterized as the "garden-variety" cash sale (8A), holding that the acquisition of 20% of a class of common stock in a cash tender offer followed by the exchange of that stock less than six months later for shares of an entirely different company (at an $18 million profit) presents no possibility of speculative abuse, thereby excluding the exchange from the statutory term "sale".

In so doing, the court of appeals takes it for granted that the losing contestant in a take-over effort cannot possibly reap a speculative profit, drawing upon particular facets of the Occidental tender offer. Such an *ad hoc* approach ignores the possibilities for speculative abuse inherent in any situation where two companies propose to merge and a large recently-acquired dissident block of stock is outstanding in one of them. Aside from his statutorily presumed access to inside information, the insider holding such a block can use his stock position to make a profitable arrangement, not available to other shareholders, for himself. This is exactly what Occidental did here in carrying forward its threats of a proxy fight, supported by legal demands and litigation (which enabled it to secure an extensive inspection of Old Kern's books and records), until it was able to secure a special (and very profitable) arrangement for itself in the form of the Option Agreement.

The court of appeals' treatment of the exchange of securities raises a further question of general importance to the future application of Section 16(b): Whether the courts may grant *ad hoc* exemptions from Section 16(b) in cases involving so-called "unusual" transactions. Aside from a few exceptions set forth in the statute, Section 16(b) mandates recovery from an insider of any profit realized through the

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purchase and sale of equity securities of the relevant issuer within a six-month period, but provides that it shall not apply to "any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose" of Section 16(b). Thus, the statute clearly imposes a broad objective standard of liability, reserving to the Commission through rule-making proceedings of a legislative nature, and not to the courts in individual cases, the power to define types of transactions which should be exempt. This statutory scheme thus provides the possibility of relief for persons deserving it in "situations that Congress scarcely considered" (9A) without undermining the "mechanical quality" of the statute* by encouraging every insider to resist recovery and litigate in the hope of persuading a court, as here, that it would be "repugnant" to its "sense of equity" (13A) on the facts of the particular case to require recovery of profit realized in a non-cash transaction.**

Several courts have, of course, concluded that, considered in the light of the purpose of Section 16(b), certain types of transactions, "objectively defined", should not be considered to be "purchases" or "sales" within the meaning of Section 16(b). However, these decisions have been premised on the conclusion that there was no possibility of

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* *Reliance Electric Co.* v. *Emerson Electric Co., supra,* Slip Op., p. 7.

** One member of this court has written with respect to Section 16(b):

> "[I]f the Congress intended to provide additional exceptions, it would have done so in clear language; . . . the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process." *Petteys* v. *Butler,* 367 F.2d 528, 538 (8th Cir. 1966), *cert. denied,* 385 U.S. 1006 (1967) (Blackmun, J., dissenting).

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speculative abuse where the transaction did not involve a real change in the equity investment of the insider (which in fact was maintained for more than six months)* or where the transaction was one which did not result in a profit.** These decisions do not, as the court of appeals' opinion suggests (9A), constitute a "revolt" against the objective character of Section 16(b), but are simply determinations that, in situations of the type considered, a basic element of liability was absent, *i.e.*, an investment of less than six-months' duration in the issuer or realization of a profit, and that therefore the "transaction" was not one susceptible of "speculative abuse", *i.e.*, the realization of short-term profits by insiders, which Section 16(b) is designed to prevent.

No court has ever before held that Section 16(b) liability did not exist when, as in this case, an insider acquired and disposed of an equity investment in an issuer in less than six months and realized a substantial profit in the process. Unlike the conversion cases discussed above, where the courts were able to find that the intra-corporate exchange, standing by itself, presented no possibility of speculative abuse, the court of appeals here did not hold that the Old Kern-Tenneco exchange, standing by itself, could not lend itself to speculative abuse, but instead found that the particular facts, starting with Occidental's acquisition of its shares in a tender offer, showed no evidence of speculative

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* See, *e.g.*, *Ferraiolo* v. *Newman*, 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959); *Blau* v. *Lamb*, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967) and *Petteys* v. *Butler*, *supra* (conversion of convertible security); *Blau* v. *Mission Corp.*, 212 F.2d 77 (2d Cir.), *cert. denied*, 347 U.S. 1016 (1954) (transfer to 100%-owned subsidiary); *Blau* v. *Max Factor & Co.*, 342 F.2d 304 (9th Cir.), *cert. denied*, 382 U.S. 892 (1965) (exchange of substantially identical classes of equity security).

** See, *e.g.*, *Shaw* v. *Dreyfus*, 172 F.2d 140 (2d Cir.), *cert. denied*, 337 U.S. 907 (1949) (private gift).

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abuse. Only by undertaking such an *ad hoc* examination of Occidental's situation (and by accepting without trial Occidental's protestations of innocence) was the court of appeals able to conclude that an exchange of securities of one company for those of a totally separate and distinct company was not a "sale" for purposes of Section 16(b). Prior to the decision below, no court had ever held that an exchange of securities in different companies was anything other than a "purchase" or "sale" of such securities.* (*Cf., SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), holding in a Section 10(b) action that "shareholders 'purchased' shares in the new company by exchanging them for their old stock.")

The decision below represents an abrupt departure from existing law, carving out a judicial exemption for unsuccessful tender offerors which will have widespread impact and raising the possibility of creating other similar *ad hoc* exemptions. This is completely contrary to the statutory purpose underlying Section 16(b).

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* *Newmark* v. *RKO General, Inc., supra; Marquette Cement Mfg. Co.* v. *Andreas*, 239 F.Supp. 962 (S.D.N.Y. 1965); *Blau* v. *Hodgkinson*, 100 F.Supp. 361 (S.D.N.Y. 1951); *Gold* v. *Scurlock*, 324 F.Supp 211 (E.D. Va. 1971).

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CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals for the Second Circuit reversed.

Respectfully submitted,

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February 17, 1972.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 69, 70, 71, 72—September Term, 1971

Argued September 21, 1971 Decided October 13, 1971

Docket Nos. 71-1273, 71-1274, 71-1275, 71-1276

STEPHEN ABRAMS,
Plaintiff,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Defendant-Appellant,

and

KERN COUNTY LAND COMPANY, a Delaware Corporation, *et al.*,
Defendants to Counterclaims-Appellees.

ISAAC MUKAMAL,
Plaintiff,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Defendant-Appellant,

and

DWIGHT M. COCHRAN, *et al.*,
Defendants to Counterclaims-Appellees.

KERN COUNTY LAND COMPANY, a Delaware Corporation,
Plaintiff-Appellee,

and

STEPHEN ABRAMS,
Plaintiff-Intervenor,

v.

OCCIDENTAL PETROLEUM CORPORATION, a California Corporation,
Defendant-Appellant,

and

TENNECO INC., a Delaware Corporation, *et al.*,
Defendants to Counterclaims-Appellees.

COLONIAL REALTY CORPORATION,
Plaintiff,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Defendant-Appellant,

and

KERN COUNTY LAND COMPANY, a Delaware Corporation, *et al.*,
Defendants to Cross-Claims-Appellees.

Before:

FRIENDLY, *Chief Judge*,
MOORE and TIMBERS, *Circuit Judges*.

FRIENDLY, *Chief Judge*:

I.

This appeal by Occidental Petroleum Corporation from a summary judgment of $23,511,337.94, rendered against it in the District Court for the Southern District of New York, raises important questions with respect to the problems under § 16(b) of the Securities Exchange Act that may be encountered by the maker of a tender offer who finds himself outflanked by a "defensive merger," arranged by the target company, which is even more advantageous to the latter's stockholders.

Since the facts are stated in detail in the opinion of the district court, 323 F.Supp. 570 (1971), a summary will suffice:

Kern County Land Company (Old Kern) was a California corporation with 4,328,140 common shares outstanding. Between January 1, 1966 and May 8, 1967, the stock, traded on the New York and Pacific Coast Stock Exchanges, had generally been selling in the 50's and 60's, although it had sold as high as $76.25 per share. It had been paying an annual dividend of $2.60 per share. After unsuccessful efforts to induce the management of Old Kern to discuss a merger, Occidental, on May 8, 1967, announced and on May 9, widely published an offer to purchase shares of Old Kern. The offer, which was to expire June 8, 1967, committed Occidental to purchase all shares properly tendered, on a first-come first-served basis, up to 500,000, at $83.50 per share and to pay an additional $1.50 per share commission for all shares tendered through a broker. Oc-

cidental reserved the right to purchase stock tendered in excess of 500,000 shares. On the last trading day before announcement of the offer, Old Kern stock had closed on the New York Stock Exchange at $63.625 per share.

As might have been anticipated, the offer was widely accepted. By May 10 more than 500,000 Old Kern shares had been tendered, so that Occidental had become the beneficial owner of more than 10% of the common stock of Old Kern and thus subject to the requirements of § 16(a) and (b) of the Securities Exchange Act. On May 11 Occidental extended the offer to include an additional 500,000 shares. By May 31 its stock ownership in Old Kern had attained 883,381 shares; by June 8, when the offer expired, the figure had grown to 887,549.[1]

As is frequently the case, Occidental's offer was vigorously resisted by the management of Old Kern. On May 10 it advised stockholders not to accept Occidental's offer, indicating that this might not be the best available since the Old Kern management was then carrying on merger discussions with several other companies. When Occidental extended its tender offer, Old Kern sent telegrams to all stockholders requesting them not to tender.

On May 19 Old Kern's directors announced their acceptance of an offer by Tenneco, Inc., a Delaware corporation, whereby, in exchange for the transfer of Old Kern's assets to a newly organized wholly owned subsidiary (New Kern) of Tenneco Corporation, itself a wholly owned subsidiary

1. These figures include 1900 shares purchased on the open market on April 24 and April 28, 1967 for which no § 16(b) liability was asserted, by reason of the fact that Occidental did not, by virtue of those purchases, become a more than 10 percent beneficial owner of issued and outstanding stock.

As a result of the better Tenneco offer described below, only 3,376 Old Kern shares were tendered between May 19, 1967, the date of public announcement of acceptance by Old Kern of Tenneco's offer, and June 8, 1967, the expiration date of Occidental's irrevocable tender offer.

of Tenneco, each share of Old Kern would be exchanged for one share of a new $5.50 preference voting stock of Tenneco, convertible into 3.6 shares of common stock.[2] The sale of Old Kern's assets was governed by California corporation law which required approval only of a majority of Old Kern's stockholders and provided no appraisal rights for dissenters. In contrast to Occidental's cash offer, the Tenneco exchange was expected to be free of capital gains tax. In a report to its shareholders on May 19, 1967, the president of Occidental estimated that the value of the new Tenneco preferred was $105 per share. The Old Kern-Tenneco plan, executed on June 14, 1967, provided for a closing at a date to be agreed upon between September 30 and December 31, 1967, or at such other time as the parties might agree.

Occidental responded by initiating two mandamus actions in the California courts, seeking extensive inspection of the books and records of Old Kern including stockholder's lists.[3] Although Old Kern gave some information to Occidental, there is nothing to indicate that this went beyond what was readily available to any stockholder.

While the detailed Tenneco-Old Kern plan was being formulated, Occidental and Tenneco were also in negotiations. These resulted in an option agreement dated June 2, 1967. Reciting that Tenneco Corporation was desirous of obtaining an option to purchase the Tenneco shares that Occidental would receive as a stockholder of Old Kern, it provided that Occidental would grant Tenneco Corporation

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2. Tenneco common had sold during 1967 in the range of 20⅞ to 32½.

3. Under California law any stockholder was entitled to inspect "[t]he share register or duplicate share register, the books of account, and minutes of proceedings of the shareholders and the board of directors and of executive committees of the directors * * *", regardless of the amount of his holdings. Cal. Corp. Code § 3003 (West 1955). However, somewhat different procedures are available to holders of 10% or more. *Id.* § 3005.

an assignable option to purchase 886,623 such shares[4] at $105 per share. The option could be exercised at any time after December 9, 1967—six months and one day after Occidental's last contemplated acquisition of Old Kern shares. If the closing under the Old Kern-Tenneco plan occurred before December 10, the option would expire December 31; if the closing were held between December 10, 1967 and July 1, 1968, the option would expire on the thirtieth day after the closing date. For this option Tenneco paid $10 per share, or $8,886,230. If the option was exercised, this sum was to be credited against the purchase price. On the other hand, it was to be returned to Tenneco if the Tenneco-Old Kern plan was not closed by July 31, 1968. Occidental was to receive dividends on the Old Kern or Tenneco preference stock with respect to the last two quarters of 1967;[5] dividends accruing in 1968 would be divided according to the exercise date of the option. At the same time, Tenneco orally assured Occidental that the new Tenneco preference shares would not be listed or registered under the 1934 Act until the option had been exercised or had expired.[6] On the

4. This figure is 926 shares less than Occidental's ultimate ownership of Old Kern shares. The discrepancy apparently results from uncertainty as to the number of shares tendered, and the continuation of the tender offer, irrevocable by its terms, for an additional six days after signing of the option agreement.

5. The district court found that Occidental would receive third and fourth quarter dividends "outright," regardless of record ownership, 323 F. Supp. at 576, 582-583; appellant argues that this ruling is erroneous and that, in fact, payment of dividends was dependent on record ownership. Our disposition of the case makes it unnecessary to rule on this contention.

6. Occidental's fear was that the acquisition of Tenneco preference shares at the closing of the Kern-Tenneco merger would be characterized for purposes of § 16(b) as a "purchase," and their sale upon exercise of the option as a "sale"; if both occurred within six months, Section 16(b) liability could ensue. By arranging that new Tenneco preferred shares should not be registered until after exercise or ex-

basis of this, Occidental discontinued its actions in the California courts.

Being naturally concerned over the possibility of a huge § 16(b) liability with respect to the Old Kern shares, Occidental sought to have the SEC promulgate a rule exempting it and other tender offerors who found themselves in the same situation. Despite some initial encouragement, the Commission declined to propose such a rule.[7] The Old Kern stockholders met on July 17. Occidental, in a letter dated July 14 which was read at the meeting, stated it had decided, prior to the June 2 option agreement, not to oppose the sale of assets, since it did not regard the terms as unfair or inequitable. It did not vote its stock, but the necessary

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piration of the option, Occidental sought to place the transaction outside the scope of Section 16(b).

Prior to the Securities Acts Amendments of 1964, Pub.L. 467, 88th Cong. 2d Sess., Act of August 20, 1964, 78 Stat. 565, only securities listed on the national securities exchanges required registration under the 1934 Act. Section 12(g), 15 U.S.C. § 78*l*(g), added in 1964, extended the coverage of the Act to many over-the-counter securities, but permits a short postponement in registration under that Act. See 1964 U.S. Code Cong. & Adm. News pp. 3014, 3027-3029, 3042. Since trading in the new Tenneco preference shares was initially to be limited to the over-the-counter market, registration could be postponed beyond the exercise or expiration date of the option by virtue of Section 12(g). Hopefully this would avoid § 16(b) liability. See II Loss, Securities Regulation 1038-1039 & n. 7 (2d ed. 1961); V Loss, Securities Regulation 3002 (1969 Supp.). *Cf.* Heli-Coil Corp. v. Webster, 352 F.2d 156, 160 & n. 6, 166 n. 13 (3 Cir. 1965) (en banc). We are told that the district court dismissed two suits against Occidental for § 16(b) liability with respect to the Tenneco shares precisely for this reason. Goodman v. Tenneco, Inc., 68 Civ. 184 (S.D.N.Y. July 24, 1968); Feinberg v. Tenneco, Inc., 68 Civ. 350 (S.D.N.Y. July 24, 1968). We need not and do not express any opinion on this matter.

7. It is not contended that we should draw any inferences from this, and we do not do so. The Commission may have thought the rule unnecessary or undraftable. Or, as suggested by appellant's counsel, it may have thought the time inappropriate, since the Williams Bill with respect to tender offers, now §§ 13(d) and (e) and 14(d), (e) and (f) of the Securities Exchange Act, was pending before Congress.

majority was readily obtained. On August 4 the Internal Revenue Service issued a ruling that the transaction would constitute a tax-free exchange, provided that Tenneco Corporation rid itself of the option. Application for the necessary permits and authorization was then made to the California Commissioner of Corporations.

The parties are in dispute whether there was a "gentlemen's agreement" that Tenneco and Old Kern would not close before December 9 if Occidental's efforts to secure an exemption were unsuccessful. When it became apparent that they intended to close long before this, a number of injunction suits by Old Kern stockholders, allegedly sponsored by Occidental, began in the state courts of Texas and in federal courts in California and Nebraska. Tenneco and Old and New Kern countered with an action in a Texas court in which they obtained an *ex parte* order restraining the continued prosecution of these suits. Occidental also urged the California Commissioner of Corporations not to approve the transaction on grounds of unfairness to Occidental. He issued the necessary approval on August 30 and the closing was held that day. As part of the closing Old Kern assigned to New Kern all claims and demands accrued or to accrue by virtue of the Securities Exchange Act. Old Kern informed its stockholders that they were irrevocably entitled to the Tenneco preference shares. These were not to be registered under the 1934 Act until December 31 but could be traded over-the-counter in the meanwhile.

To conform to the ruling of the IRS, Tenneco Corp. sold its option to Loeb, Rhoades & Co., a New York investment banking firm, which later assigned this to LR Fixed Investment Trust. On December 11, 1967, Occidental tendered its Old Kern shares for Tenneco preference stock, LR Fixed Investment Trust exercised the option, and Occidental received $95 per share, or $84,229,185, in addition to the $10 per share, or $8,886,230, already in hand.

New Kern moved swiftly to assert liability of Occidental under § 16(b) by bringing an action to that end in the District Court for the Southern District of New York. Three derivative actions for the same purpose were brought by stockholders of Old Kern. The four actions were consolidated and New Kern moved for summary judgment. This was granted.[8] The court dismissed Occidental's affirmative defenses, struck four of its seven counterclaims, and directd that final judgment be entered under F.R.Civ.P.54(b). This appeal followed. The three derivative actions were dismissed as moot and the plaintiffs took no appeal from that ruling.[8a]

Appellees seek to support the judgment on two grounds. They claim first that Occidental "sold" its Old Kern shares when at the August 30 closing it became irrevocably entitled to Tenneco preference stock. They argue in the alternative that the option agreement of June 2, 1967 constituted a sale by Occidental of the Old Kern shares that had been or would thereafter be acquired. We cannot accept either contention.

II.

It is true enough that, in the case of a garden-variety purchase and sale or sale and purchase within six months,

8. The court assumed the cost of the stock to be $85 per share, a figure not here contested, and computed the sales price at $105 plus an Old Kern dividend of $0.65 per share, or $576,671.85, paid on September 21, 1967 and a Tenneco dividend of $1.375 per share, or $1,217,767.37, paid on January 9, 1968. It also allowed prejudgment interest on all profits received by Occidental. Occidental's challenges to the propriety of these two rulings, see also fn. 5 *supra*, need not be considered in light of our disposition. We similarly find it unnecessary to consider Occidental's claim that any liability should be limited to Old Kern shares acquired by it which were in excess of 10% of the total outstanding.

8a. Occidental's appeals in these actions were from the dismissal of their counterclaims. Our ruling on the merits renders these appeals moot, and they are dismissed as such.

the situations to which Congress' attention was primarily addressed when it enacted § 16(b) of the Securities Exchange Act, the statute operates as a "crude rule of thumb,"[9] and that it would be no defense that a person within its terms was operating, by sheer intuition, from Antarctica or even from outer space. See Smolowe v. Delendo Corp., 136 F.2d 231, 235 (2 Cir.), cert. denied, 320 U.S. 751, 64 S.Ct. 56, 88 L.Ed. 446 (1943). The only way to avoid § 16(b) liability in such cases is to see to it that the matching transaction is postponed beyond the six months period, although one day is enough to do the trick.[10] Some decisions of this court reflect, at least in dictum, a belief that this principle should be applied, across the board, even to situations that Congress scarcely considered. The high water mark of this rather simplistic approach was the statement in Park & Tilford, Inc. v. Schulte, 160 F.2d 984, 987 (2 Cir.), cert. denied, 332 U.S. 761, 68 S.Ct. 64, 92 L.Ed. 347 (1947), a case of the sale of common stock within six months of an economically compelled conversion of long held preferred into common:

> Defendants did not own the common stock in question before they exercised their option to convert; they did afterward. Therefore they acquired the stock, within the meaning of the Act.

However, that mechanistic view did not long persist even in our own court, see Roberts v. Eaton, 212 F.2d 82 (2 Cir.), cert. denied, 348 U.S. 827, 75 S.Ct. 44, 99 L.Ed. 652 (1954). A revolt against it elsewhere was begun by the opinion of

9. Statement by Thomas G. Corcoran, Esq. in Hearings before Senate Committee on Banking & Currency, 73d Cong., 2d Sess. 6557 (1934).

10. It scarcely needs saying that our reference in this last clause is only to § 16(b) liability, not to liability for actual use of inside information.

Judge Stewart (as he then was) in Ferraiolo v. Newman, 259 F.2d 342, 346 (6 Cir. 1958), cert. denied, 359 U.S. 927, 79 S.Ct. 606, 3 L.Ed. 2d 629 (1959), which was later followed by the Ninth Circuit in Blau v. Max Factor & Co., 342 F.2d 304 (9 Cir.), cert. denied, 382 U.S. 892, 86 S.Ct. 180, 15 L.Ed. 2d 150 (1965). See, *contra,* Heli-Coil Corp. v. Webster, 352 F.2d 156 (3 Cir. 1965). The problem was given thorough consideration in Blau v. Lamb, 363 F.2d 507 (2 Cir. 1966), cert. denied, 385 U.S. 1002, 87 S.Ct. 707, 17 L.Ed.2d 542 (1967). We there made clear that, in determining whether a conversion constituted a "purchase" and started a new six months period running, we would not apply the approach of the *Park & Tilford* dictum but would look to the question whether the conversion could have lent itself to speculative abuse. We see no reason why this same principle should not apply when the question is whether the receipt of securities of another company, in a transaction which the "insider" did not arrange and in which all stockholders were entitled, indeed here were forced, to participate, constitutes a "sale."

The district court and appellees have pointed to Newmark v. RKO General, Inc., 425 F.2d 348 (2 Cir.), cert. denied, 400 U.S. 854, 91 S.Ct. 64, 27 L.Ed.2d 91 (1970), as requiring us to hold that the exchange of Old Kern for Tenneco shares was a sale, for purposes of § 16(b). We disagree. Nothing in the opinion indicates that the courts should apply a different test concerning the possibility of speculative abuse in determining whether an economically forced exchange into the securities of another company constitutes a sale than in deciding whether a conversion into a different security of the same company constitutes a purchase.[11] To the contrary, the opening section of the *RKO*

11. The *alternative* basis of Blau v. Lamb, the principle of economic equivalence between the securities being converted and the securities received, is another matter.

opinion explicitly adopts Blau v. Lamb, *supra*, as furnishing the proper criterion. The court simply sustained the finding of the district court that the criterion concerning absence of possibility of speculative abuse had not there been satisfied. RKO, owner of 56% of the common stock of Frontier Airlines, had contracted to acquire, subject to certain conditions, at $8.50 per share, 738,251 shares of Central Airlines, representing 49% of Central's outstanding shares, and $500,000 Central debentures convertible into an additional 149,994 shares. It did this, knowing that it was about to propose a merger that would greatly enhance the value of the shares it was acquiring. Furthermore, RKO had certain powers to prevent the merger and avoid liability under its contract of purchase. While the *RKO General* decision does assist appellees to the extent of its holding that an exchange pursuant to a merger *may be* a "sale," the indispensable predicate to the holding that the particular exchange there at issue was within § 16(b) was the finding that RKO's knowledge of the impending merger coupled with the ability to control it involved the possibility of speculative abuse with which § 16(b) meant to deal.

Appellees have failed to demonstrate any counterpart of this with respect to Occidental.[12] It is urged that Occidental possessed the "inside information" that Old Kern might well respond by arranging a "defensive merger" and that, if the terms were sufficiently favorable, Occidental would not try to top them. But, in contrast to *RKO General* where the buyer knew of the imminent announcement of a merger that would enhance the price of the

12. Obviously Occidental considered Old Kern was undervalued when it offered $83.50 plus a $1.50 commission for a stock that was selling at $63.625; indeed, Occidental must have thought the stock was worth not simply $85 but more, as the Old Kern stockholders surely realized. But there is not a word in the record to suggest that Occidental arrived at its opinion of the value of Old Kern on the basis of anything that was not public information.

shares and could largely control its course, Occidental had no knowledge what Old Kern would do, and certainly did not know that Old Kern would be able to arrange an exchange offer exceeding Occidental's bid by $20 per share, with the added benefit of freedom from capital gains tax. We fail to see the possibility of speculative abuse in a situation where such an offeror simply declines to make a still higher offer or to attempt to block a transaction[13] which it regards as advantageous to all the stockholders including itself. In so holding, we are glad to find ourselves in accord with law review comments both before and after this court's decision in the *RKO* case. Note, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?, 117 U.Pa.L.Rev. 1034, 1056-57 (1969); Comment, Securities Regulations—Exchange of Stock Pursuant to Merger is Sale by Insider under Section 16(b) of the Securities Exchange Act of 1934, 84 Harv.L.Rev. 1012, 1021-22 (1971).

Indeed, if we considered the question here under discussion to be closer than we do, we would be seriously concerned over the policy implications of ruling in appellees' favor. Such a holding would mean that the target of a tender offer not only may solicit a better offer, which is admirable, but also may deliver as bait to the offeree[14] a substantial § 16(b) liability on the part of the very offeror whose initiative aroused the target from its seeming torpor and created a large profit for all stockholders, if the parties can force the transaction through within six months from

13. While we need not decide whether the result here would differ if Occidental had voted its stock in favor of the merger and this was essential to the required majority, we are not inclined to think this would be significant.

14. It should be noted that the large recovery ordered by the district court enures to the benefit of all stockholders of Tenneco. The stockholders of Old Kern share in this only to the extent of their holdings of Tenneco convertible preferred.

the latter's purchases.[15] The idea that the person who pointed the company down the road to good fortune should be excluded from the profits realized by all other stockholders is repugnant to our sense of equity. Moreover, any such rule would operate to discourage tender offers for more than 10% of a company's stock. If such bids are to have any hope of success, they must be at a figure in excess of current market value. Under appellees' view, while the offeror will be left with the stock he has acquired if he has equalled or topped its true value, he will be deprived of any benefit if he has under-estimated the true value and the target corporation can force him into an exchange within six months. This would discourage the making of such offers, which often operate to the great benefit of stockholders of the target corporation, as appears to have been the case here.

III.

We thus come to appellees' alternative contention, namely, that the option agreement of June 2, 1967, constituted a sale of the Old Kern shares.

We begin by recognizing that, under the statutory definition, § 3(a) (14), "sale" includes "contract to sell." We recognize also that an option entitling the optionee to purchase is a contract to sell in a dictionary sense. But the established rule in this circuit has been that the mere grant of an option to purchase is not a sale for purposes of § 16(b): this occurs only when the optionee exercises the option. Silverman v. Landa, 306 F.2d 422 (2 Cir. 1962).

It is true that, despite *Silverman*, courts will look through the form of an option to the economic realities.

15. The only way in which the offeror could protect itself would be by limiting its acquisitions to less than 10% of the stock. Nothing in the Williams Act indicates that Congress had any intention of conferring any such further protection on "target" companies.

When the down payment is so large in relation to the purchase price that exercise is practically compelled or the price is below any reasonable expectation of the value of the security at the end of the option period, a court might find that in truth and fact a sale had occurred when the "option" was granted. We see no basis for such a finding here, and we do not read the district court's opinion as making one, 323 F.Supp. at 572, 576. There was undisputed testimony that the forfeitable down payment, 10.05%, was a reasonable, non-coercive price, *a fortiori* so in view of the possibility, thin as that might have been, that the option premium might have to be refunded if unforeseen difficulties prevented consummation of the merger. The total price per share was precisely what Lehman Brothers, Occidental's investment adviser, had estimated the Tenneco stock to be worth. It was by no means certain that in the interval between June 2 and December 9, 1971 when the option first became exercisable, the market price of the Tenneco preference shares might not drop well below $95.[16]

Tenneco argues against this that, with a block of such size, market prices would not be determinative, since Tenneco was looking to the long term and did not want Occidental as a large stockholder any more than Occidental wanted to be one. While this is doubtless so, it is likewise true that if the bottom had fallen out of the market, as it has been known to do, so that the Tenneco shares were selling at say 75 at the exercise date, the Tenneco management might have had serious second thoughts—including thoughts of the possibilities of derivative actions for waste—about using more than $84,000,000 in cash to buy its own stock at a $20 per share premium. We thus see no reason for not accepting the truth of what was said

16. This is *a fortiori* true of the various expiration dates, which might extend as long as July 31, 1968.

in the Old Kern proxy statement: "Tenneco Corporation has not determined whether it will exercise its option. • • • Depending upon future investment market conditions, Tenneco Corporation may sell the option or the Preference Stock covered by the option; its present intention is not to purchase such Preference Stock as an investment." The mere fact that the option was so designed that Tenneco could not require Occidental to sell the Tenneco preference shares until six months and one day after its last purchase of Old Kern shares, a period obviously chosen with reference to § 16(b), does not place the transaction within that section if it is not otherwise there.

Appellees rely heavily on Bershad v. McDonough, 428 F.2d 693 (7 Cir. 1970), cert. denied, 400 U.S. 992, 91 S.Ct. 458, 27 L.Ed.2d 440 (1971), as holding the contrary. That case came before the court of appeals on a finding by the district court that, under the circumstances there presented, the stock had in fact been sold within the six months period, although the option was not formally exercised until later. The district court had relied on a number of circumstances, the most significant being that the optionor gave the optionee an irrevocable proxy to vote the shares and that the optionor and one of his associate directors resigned as directors within a few days after the grant of the option and were replaced by officers of the optionee. In other words, the district court found in effect that the "option" was accompanied by a wink of the eye, and the court of appeals sustained this. Here there is no such finding, and no basis for one. There is thus no conflict between the *Bershad* decision and what we rule here, although we would not be understood as necessarily agreeing with everything said in the court's opinion.

Appellees argue finally that Occidental took advantage of its position to get something for itself that was not avail-

able to other Old Kern stockholders and that we should therefore consider this option as a "sale," despite the contrary implications of Silverman v. Landa. We need not disagree with the position that, under the approach of Blau v. Lamb, a court may sometimes find a "purchase" or "sale" in a transaction that would not ordinarily be regarded as one. Although we do not decide the point, appellees' argument might indeed have force if Occidental had acquired a "put," exercisable six months and one day after its last purchase, rather than having submitted itself to a "call." But the two situations are quite different, and we cannot see how Occidental took any unfair advantage of its position here. As indicated, the option price was precisely what Occidental's investment adviser had estimated the value of the Tenneco stock to be a fortnight before. Indeed, the option might have proved disadvantageous to Occidental if the Tenneco stock had boomed or if someone desiring to make a target of Tenneco had come forward with an offer to Occidental. The option seems to us to have been a straight-forward business arrangement between one company that found itself in the undesired position of becoming "locked in" as a large minority stockholder and a second company that was eager to remove the threat this imposed,[17] if economic circumstances permitted.

We therefore reverse the grant of summary judgment for the plaintiffs. Although defendant did not move for summary judgment, it asks us to instruct the district court to enter one in its favor, as we clearly have power to do. First National Bank v. Maryland Casualty Co., 290 F.2d 246, 251 (2 Cir.), cert. denied, 368 U.S. 939, 82 S.Ct. 381, 7 L.Ed.2d

17. The threats were not merely Occidental's owning a large block of Tenneco voting stock but the effect on the market of knowledge that this large holding would be offered for sale.

338 (1961); Local 33, Int'l Hod Carriers v. Mason Tenders, 291 F.2d 496, 505 (2 Cir. 1961); Stein v. Oshinsky, 348 F.2d 999, 1002 (2 Cir.), cert. denied, 382 U.S. 957, 86 S.Ct. 435, 15 L.Ed. 2d 361 (1965). Appellees' brief contains nothing to suggest that we should not follow that course if we should determine to reverse, and inquiry at the argument failed to reveal any new facts that might be adduced by them at an evidentiary hearing. While the affidavits are in conflict on some points, notably on the understanding alleged by Occidental that Old Kern and Tenneco would arrange the closing date to protect Occidental against §16(b) liability, none of these has dispositive significance in the view we take of the case. We therefore grant the relief sought by appellant.

The order granting summary judgment against Occidental is reversed, with instructions to enter judgment dismissing the complaint.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October, one thousand nine hundred and seventy-one.

Present: Hon. HENRY J. FRIENDLY, Chief Judge,
Hon. LEONARD P. MOORE,
Hon. WILLIAM H. TIMBERS, Circuit Judges.

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67 Civ. 2858

KERN COUNTY LAND COMPANY, a Delaware Corporation,
Plaintiff-Appellee,

and

STEPHEN ABRAMS,
Plaintiff-Intervenor-Appellee,

v.

OCCIDENTAL PETROLEUM CORPORATION,
a California Corporation,
Defendant-Appellant,

and

TENNECO INC., a Delaware Corporation, *et al.,*
Defendants to Counterclaims.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court granting summary judgment against the appellant, Occidental Petroleum Corporation, be and it hereby is reversed and that the action be and it hereby is remanded to said District Court with instructions to enter judgment dismissing the complaint in accordance with the opinion of this court with costs to be taxed against the appellees, Kern County Land Company (New Kern) et al.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1273, 71-1274-75 & 76

STEPHEN ABRAMS,
Plaintiff-Appellee,

v.

OCCIDENTAL PETROLEUM CORPORATION, TENNECO INC. and KERN COUNTY LAND COMPANY,
Defendants-Appellants,

and

KERN COUNTY LAND COMPANY, a Delaware Corporation, *et al.*,
Defendants to Counterclaims.

A petition for a rehearing having been filed herein by counsel for the appellees, Kern County Land Company, Tenneco Inc. and Tenneco Corporation,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

HENRY J. FRIENDLY,
Chief Judge

LEONARD P. MOORE,
U.S.C.J.

WILLIAM H. TIMBERS,
U.S.C.J.

November 19, 1971.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1273, 71-1274-75 & 76

STEPHEN ABRAMS,

Plaintiff-Appellee,

v.

OCCIDENTAL PETROLEUM CORPORATION, TENNECO INC. and KERN COUNTY LAND COMPANY,

Defendants-Appellants,

and

KERN COUNTY LAND COMPANY, a Delaware Corporation, *et al.*,

Defendants to Counterclaims.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, Kern County Land Company, Tenneco Inc. and Tenneco Corporation, a poll of all the active circuit judges having been taken, and a majority not having been obtained, it is ordered that said petition be and it hereby is denied. Judge Hays dissents.

HENRY J. FRIENDLY,
Chief Judge

November 19, 1971.

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Action No. 1
67 Civ. 2858

STEPHEN ABRAMS,
against — *Plaintiff,*

OCCIDENTAL PETROLEUM CORPORATION, *et al.*,
and — *Defendants,*

KERN COUNTY LAND COMPANY, a Delaware Corporation, *et al.*,
Defendants to Counterclaims.

Action No. 2
67 Civ. 3291

ISAAC MUKAMAL,
against — *Plaintiff,*

OCCIDENTAL PETROLEUM CORPORATION, *et al.*,
and — *Defendants,*

DWIGHT M. COCHRAN, *et al.*,
Defendants to Counterclaims.

Action No. 3
67 Civ. 4042

KERN COUNTY LAND COMPANY,
a Delaware Corporation,
and — *Plaintiff,*

STEPHEN ABRAMS,
against — *Plaintiff-Intervenor,*

OCCIDENTAL PETROLEUM CORPORATION,
a California Corporation,
and — *Defendant,*

TENNECO INC., a Delaware Corporation, *et al.*,
Defendants to Counterclaims.

Action No. 4
67 Civ. 4977

COLONIAL REALTY CORPORATION,
against — *Plaintiff,*

OCCIDENTAL PETROLEUM CORPORATION, *et al.*,
Defendants.

November 27, 1970

PALMIERI, *District Judge.*

These proceedings relate to the liability under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), of Occidental Petroleum Company (Occidental) for short-swing profits from the purchase and sale of securities. Several motions for summary judgment are presently before the Court. They grow out of four suits initiated in this court against Occidental for its part in a series of transactions between May and December, 1967, relating to Occidental's attempt to take over a prosperous California corporation, the Kern County Land Company (Old Kern); and Old Kern's subsequent merger with a subsidiary of Tenneco Inc. (Tenneco). Three of the suits, 67 Civ. 2858, 67 Civ. 3291, and 67 Civ. 4977 (Actions Nos. 1, 2 and 4 respectively), were brought by stockholders of Old Kern; the remaining suit, 67 Civ. 4042 (Action No. 3), was brought by the subsidiary of Tenneco which succeeded to the business and assets of Old Kern. As the discussion, findings and conclusions which follow indicate, this Court rules in favor of the plaintiff in Action No. 3.

Old Kern, incorporated in California before 1900, had by 1967 developed a multi-million dollar diversified enterprise centered on real estate, oil and gas properties as well as agricultural and livestock interests, located primarily in California; its stock was listed for trading on the New York Stock Exchange and the Pacific Coast Stock Exchange, and between January 1, 1966, and May 5, 1967, had traded at prices between $56.00 per share and $76.25 per share. Occidental is also a California corporation. In 1967 its basic business activity involved the production and sale of petroleum, natural gas, coal, sulphur, and fertilizers. Tenneco, a Delaware corporation, at the time was the parent of a group of companies whose primary activities were the production of petroleum and natural gas in the Gulf Coast

region and its distribution by means of an extensive pipeline network to the Northeastern and Midwestern areas of the country. Among Tenneco's subsidiaries was the Tenneco Corporation, which was the immediate parent within the Tenneco family of a new Delaware corporation (hereinafter New Kern) formed to succeed to the business of Old Kern.[1]

As part of its expansion program, in the early part of 1967, Occidental approached the management of Old Kern to explore merger possibilities. When rebuffed by Old Kern, Occidental made a public tender offer in May, 1967, for the purpose of acquiring over 20 percent of the outstanding common stock of Old Kern at a price more than 30 percent higher than the then-current market price of the stock. The management of Old Kern opposed Occidental's takeover bid, and by way of defensive strategy agreed with Tenneco upon a sale of assets; the agreement was embodied in a document (the Plan) dated June 1, 1967, subject to the approval of the stockholders of both companies. Under the Plan, New Kern was to acquire all of the assets and business of Old Kern; in exchange, the shareholders of Old Kern would receive shares of a new class of Tenneco convertible preference stock on the basis of one Tenneco share for each share held of Old Kern stock. By the end of May, 1967, Occidental had become the holder of 883,381 shares, the largest single block of Old Kern stock and more than 20 percent of the total shares outstanding.

1. At the closing, title to the assets and business of Old Kern was taken by Tenneco in the name of KCL Corp., a Delaware corporation and a new subsidiary of Tenneco, formed for the sole purpose of receiving Old Kern's assets. After the closing the name of KCL Corp. was changed to the Kern County Land Company. The term New Kern is used herein to encompass both KCL Corp. and the Kern County Land Company, which are deemed for all relevant purposes to be the same entity.

On June 2, 1967, Occidental entered into an agreement with the Tenneco Corporation under which, in substance, Tenneco Corporation acquired an option to purchase the shares of the new convertible preference stock of Tenneco which Occidental would receive as an Old Kern shareholder upon consummation of the sale of assets to Tenneco; Occidental was to be paid $105 per share for its holding in the new Tenneco stock. Occidental thereafter desisted from any further opposition, and in a letter, read at the Old Kern stockholders' meeting of July 17, 1967, at which the Plan was approved, Occidental offered its opinion that the Plan was a favorable arrangement for Old Kern shareowners.

When it became known that the Tenneco-Old Kern Plan was scheduled for a closing within six months of Occidental's purchases of Old Kern stock in May, 1967, Occidental sought a ruling from the Securities and Exchange Commission (SEC) exempting it from any liability under Section 16(b). It was unsuccessful. Numerous suits were brought in various courts in Texas, Nebraska and California, initiated by Old Kern stockholders, owners of miniscule numbers of shares, and which sought to delay or enjoin the closing. These suits notwithstanding, the closing of the Plan was held on August 30, 1967. Old Kern ceased to be a functioning company, and it was formally dissolved in October, 1967. Tenneco Corporation exercised its option to purchase Occidental's holdings of the Tenneco preference stock in December, 1967.

Of the instant suits, Actions Nos. 1 and 2 were filed prior to the closing of the Tenneco-Old Kern Plan, and contained, *inter alia*, causes of action under Section 16(b). New Kern brought Action No. 3 after the closing and asserted liability only under Section 16(b). Thereafter, another stockholder of Old Kern, Colonial Realty Corporation, initiated Action

No. 4 against Occidental, in which it too sought to recover for Old Kern any Section 16(b) profits made by Occidental. In an order dated June 14, 1968, the late Judge Herlands of this Court consolidated Actions Nos. 1, 2 and 4, i. e., those brought by former stockholders of Old Kern, for pre-trial purposes and appointed general counsel to supervise pre-trial matters in those actions. Abrams v. Occidental Petroleum Corp., 44 F.R.D. 543 (S.D.N.Y. 1968). In these derivative shareholder actions, profits are sought to be recovered from Occidental by way of motions for summary judgment in favor of Old Kern (Actions 1 and 4) and by a similar motion as well as a prayer for declaratory judgment in favor of Old Kern or New Kern (Action No. 2).

Additionally, New Kern, plaintiff in Action No. 3, has moved for summary judgment on its four causes of action under Section 16(b). Basing its right to receive any recovery on the terms of the Tenneco-Old Kern Plan, and on a specific assignment on August 30, 1967, from Old Kern to New Kern of any Securities Exchange Act claims that might accrue, New Kern argues, and this Court agrees, that Occidental's liability should be predicated upon a matching of the total number of shares of Old Kern stock acquired in the May, 1967 tender offer with the disposition of these shares through Occidental's grant of the June 2 option to Tenneco Corporation and by way of the closing of the Tenneco-Old Kern Plan on August 30, 1967.

Also before the Court is a motion by the defendant Occidental for summary judgment seeking (1) dismissal of all Section 16(b) causes of action in Actions Nos. 1, 2 and 4, on the ground that the stockholder plaintiffs lack standing to sue, or (2) in the alternative, for an order pursuant to Rule 42(b), Fed. R. Civ. P., directing a separate trial on the issue of standing to sue in advance of any trial on the merits.

The findings of fact and conclusions of law which follow are intended to amplify and supplement what is set forth

above. There is no genuine issue as to any material facts upon which they are based. Rule 56(c), Fed. R. Civ. P. New Kern's motion for summary judgment is granted. The summary judgment motions of plaintiffs in Actions Nos. 1, 2 and 4, similarly based upon 16(b) violations are denied solely because they are deemed moot by the decision in favor of New Kern. The motions of defendant Occidental are denied.

Findings of Fact

1. In the spring of 1967, Occidental determined to attempt an acquisition of Old Kern. On April 24 and April 28, 1967, Occidental purchased a total of 1900 shares of Old Kern stock on the open market. No Section 16(b) liability is asserted with respect to these shares, since Occidental was not at that time, nor did it become by virtue of those purchases, a beneficial owner of more than 10 percent of Old Kern's issued and outstanding stock.

2. In the belief that ownership of a large block of Old Kern stock would cause the management of Old Kern to be amenable to discussions of merger or consolidation, on Monday, May 8, 1967, Occidental announced a public tender offer with respect to the stock of Old Kern. The terms of the offer were published in more than 50 publications throughout the country beginning on May 9. The tender offer, to expire June 8, 1967, committed Occidental to "purchase all shares properly tendered by the expiration of the offer, up to 500,000 shares." Occidental reserved the right to purchase shares tendered in excess of 500,000. The purchase price was set at $83.50 per share, and Occidental undertook to pay an additional $1.50 commission per share on all shares tendered through a broker; for the purposes of the motions now before the Court, the parties accept the figure of $85.00 as Occidental's per share cost of acquisition.

3. The closing price of Old Kern's stock on the New York Stock Exchange on Friday, May 5, 1967, the last trading date prior to the announcement of the tender offer, was $63.625 per share.[2] As of May 10, 1967, Old Kern had exactly 4,328,140 shares of stock issued and outstanding.

4. Sometime after the tender offer and in May, 1967, the president and executive vice-president of Occidental appeared at the offices of Old Kern in San Francisco and announced to Old Kern's president that they were there to discuss the terms of a merger. Old Kern's president refused to discuss the matter.

5. By May 10, 1967, more than 500,000 shares of Old Kern stock had been tendered to Occidental, enough to make Occidental a beneficial owner of more than 10 percent of Old Kern's issued and outstanding stock. Occidental thereupon, on May 11, extended the tender offer to encompass an additional 500,000 shares; the other terms and conditions remained unchanged. On May 18, 1967, Occidental, as such beneficial owner, filed a Form 3, Initial Statement of Beneficial Ownership of Securities, with the Securities and Exchange Commission, indicating direct ownership of 507,055 shares of Old Kern stock; on June 9, 1967, Occidental filed a Form 4, Statement of Changes in Beneficial Ownership of Securities, for the month of May, indicating the purchase of an additional 376,326 shares of Old Kern stock, for a total ownership as of May 31, 1967, of 883,381 shares. An additional 4,168 shares were purchased by June 8, 1967, so that as of June 30, 1967, Occidental held 887,549 shares of Old Kern stock in direct ownership.

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2. There seems to be an inconsistency between the first tender offer (New Kern's Exhibit A) and the extended or second tender offer (see *infra*, Finding of Fact No. 5; New Kern's Exhibit B) insofar as the price range for 1966 in Old Kern stock is concerned. While the high is consistently stated to be $76¼, the low is stated to be $56 in Exhibit A and $51¾ in Exhibit B.

6. The management of Old Kern vigorously resisted Occidental's tender offer, writing a letter to stockholders on May 10, 1967, cautioning against tender and indicating that Occidental's offer might not have been the best available since the Old Kern management was then carrying on merger discussions with several other companies. When Occidental extended its tender offer, the president of Old Kern sent a telegram to all stockholders again requesting that shareowners refrain from tendering their stock.

7. Upon becoming the beneficial owner of more than 10 percent of Old Kern's stock, at least the following possibilities were available to Occidental, as Old Kern's largest stockholder:

> 1. Old Kern might have been induced to buy out Occidental's interest in the company, at a profit to Occidental;
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> 2. Any company which merged with, or succeeded to the business of, Old Kern might have been induced to buy out Occidental's interest, at a profit to Occidental;
>
> 3. Occidental might have been able to take over the management of Old Kern;
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> 4. Occidental might have been able to veto a takeover of Old Kern by any other company; or
>
> 5. Occidental might have retained its interest in Old Kern or in any new company formed by merger, wielding considerable influence in the policies and operations of the company in either event.

At least alternatives 1 and 2 would present the possibility for speculative abuse by Occidental of its position in Old Kern, as that term is understood within the purview and intendment of Section 16(b). Apart from the abuse of inside information, which is presumed to exist under the statute, the possibilities of abuse in the factual context of

this case can readily be envisaged. For example, Occidental could have used inside information to enable it to decide whether or not to fight the merger or sell its stock.[3] Indeed Occidental elected to enter into the option agreement.

8. On May 19, 1967, Old Kern's board of directors approved an offer made by Tenneco under which, in exchange for the transfer of all of Old Kern's assets and business, Old Kern's stockholders were to receive, for each share of Old Kern stock held, one share of a new $5.50 cumulative convertible preference stock to be issued by Tenneco. The annual dividend of $5.50 per share on the new Tenneco stock was more than double the current annual dividend rate of $2.60 per share on the Old Kern stock; each share of the new Tenneco preference stock was convertible into 3.6 shares of Tenneco common stock. Occidental, as an owner of 887,549 shares of Old Kern stock, would receive a like number of the new Tenneco shares. In a progress report to its shareholders on May 19, 1967, the president of Occidental estimated that the value of the Tenneco preference stock was equivalent to $105 per share.

The acceptance of the Tenneco offer by Old Kern's board was announced publicly the same day. In approving the transaction with Tenneco, the Old Kern board simultaneously rejected an oral offer which Occidental had made to it the same day.

9. As a result of the impending Tenneco-Old Kern reorganization, the president of Occidental stated in the said progress report of May 19, 1967, that based on the approximately 900,000 shares which Occidental had purchased, a profit of about 18 million dollars was indicated.

3. In the period May 20-June 2, 1967, Occidental, as Old Kern's largest stockholder, demanded and received access to books and records of the company.

10. The details of the Tenneco-Old Kern transaction approved by the Old Kern board on May 19, 1967, were subsequently set out in a detailed Agreement and Plan of Reorganization, dated June 1, 1967. Under paragraph 7.1 of the Plan, Old Kern agreed to transfer, and New Kern agreed to accept

> all of the assets and properties, business and goodwill of [Old] Kern of every kind and description * * * including without limitation all properties, tangible or intangible, real, personal or mixed, accounts receivable, bank accounts, choses in action, claims, cash and all securities * * *.

Under paragraph 7.3 of the Plan, Old Kern agreed that

> it will convey, transfer, assign and deliver to [New Kern] all properties, claims, choses in action, rights, and other assets which [Old] Kern may acquire or to which it may become entitled on or after the Closing Date * * *.

Tenneco agreed in paragraph 7.5 to have New Kern deliver to Old Kern an aggregate number of shares of the new Tenneco preference stock equal to the number of shares of Old Kern issued and outstanding on the closing date. Old Kern agreed to have this new stock distributed promptly to the holders of Old Kern stock, in exchange for the surrender of the Old Kern stock then held by the shareowners. The Tenneco preference stock would be issued as an unregistered security.

The obligations of the parties under the Plan were contingent on shareholder approval of the transaction, approval by counsel, favorable rulings from the Internal Revenue Service on the tax consequences of the transaction to Old Kern and its shareholders, and the obtaining of all permits, licenses and authorizations necessary from the California Division of Corporations.

Under paragraph 7.9 of the Plan, the closing under the plan was to take place between September 30 and December 31, 1967, on a date to be agreed upon by the parties, or "at such other time • • • as the parties may agree upon." Under paragraph 15.2(i), the parties retained the power to amend the Plan by mutual consent, without shareholder approval, to

> change the time for performance of any of the obligations or activities of the parties hereto, including changes of the time and place of the Closing.

The parties also retained the power to waive by mutual consent compliance with any of the covenants and conditions of the Plan and to waive or modify performance by the parties of any of the obligations therein. Plan, ¶ 15.2(iii).

11. On May 25 and May 31, 1967, Occidental initiated two mandamus actions in the California state courts seeking extensive inspection of the books and records of Old Kern, including the stockholder lists. Old Kern made available to Occidental some of the items sought, but did not produce the lists of stockholders. Following the signing of the Occidental-Tenneco Corporation option agreement of June 2, 1967, described in paragraph 12 below, these suits were dismissed at Occidental's direction on the basis of an undertaking by Tenneco not to register or list its newly issued preference stock until the exercise date of the option had passed.

12. Between May 30 and June 2, 1967, while the formulation of the Tenneco-Old Kern Plan was being completed, Occidental and Tenneco Corporation, a Tenneco subsidiary which was to be the immediate parent of New Kern within the Tenneco family, negotiated an option agreement with respect to the shares of the new Tenneco preference stock

Occidental would become entitled to receive upon the closing of the Tenneco-Old Kern Plan. This agreement was signed June 2, 1967. Following a recital that Tenneco Corporation was desirous of obtaining an option to purchase the shares of Tenneco stock to be received by Occidental, the agreement provided that Occidental granted to Tenneco Corporation an option to purchase, when and if issued, all of the Tenneco shares received by Occidental with respect to its holdings in Old Kern stock, stated to be 886,623 shares. The aggregate purchase price was $93,095,415, or $105 per share, excluding certain dividends hereinafter discussed. Tenneco Corporation could exercise the option at any time after December 9, 1967. If the closing of the Tenneco-Old Kern Plan occurred prior to December 10, 1967, the option expired on December 31, 1967; if the closing were held between December 10, 1967, and July 1, 1968, the option expired on the thirtieth day after the closing date.

Tenneco paid Occidental $8,866,230, i. e., $10 per share of Old Kern stock then thought to be held by Occidental, pursuant to the agreement, this amount to be credited against the purchase price of the Tenneco preference stock but to be returned to Tenneco if no closing of the Tenneco-Old Kern Plan occurred before July 31, 1968.

It was agreed that Occidental would receive outright two dividends on the Old Kern and Tenneco preference stock for the third and fourth quarters of 1967; any dividends accruing in 1968 to Occidental would be divided pro rata, the division being dependent on the date on which the option was exercised. A final recital stated that the June 2, 1967, document constituted the entire agreement between Occidental and Tenneco Corporation.

Occidental sought to arrange a liquidation of its position in Tenneco's unregistered securities, while Tenneco sought

to eliminate a potentially troublesome minority stockholder. The price per share, $105, was the value which Occidental had attributed to the Tenneco stock a short time before June 2, 1967, the date of the aforesaid option agreement.

13. Coincident with the signing of the option agreement, Occidental sought from the SEC a new rule, Rule 16(b)-11, which would exempt Occidental from the operation of Section 16(b) with respect to the Tenneco-Old Kern transactions. Occidental was aware that the closing of the Tenneco-Old Kern Plan might constitute a "sale" of Occidental's stockholdings in Old Kern, which, when matched with Occidental's acquisition of the stock within the previous six months, would impose liability upon Occidental to disgorge the profit received in the acquisition and disposition. Occidental believed at that time that the SEC would adopt the rule of exemption Occidental had proposed. However, on July 12, 1967, the SEC declined to publish for comment any proposed rule for the type of transaction involved. Occidental continued to press for such a rule, securing a formal hearing before the SEC on August 29, 1967, on the proposed rule and filing with the Commission on September 5, 1967, a 30-page letter memorandum arguing for it. Nevertheless, the SEC refused to modify its decision not to take action.

14. As early as June 6, 1967, Occidental had determined that, if the SEC did not provide it relief in the form of the proposed rule 16(b)-11, the company's only alternative was "to commence every kind of litigation it could reasonably bring and attempt to stall the consummation of the Tenneco-[Old Kern] transaction for six months." Letter of Occidental's San Francisco counsel to F. Arnold Daum, Esq., June 6, 1967, attached as Exhibit "U" to affidavit of David R. Hyde, Esq. dated May 6, 1970.

On August 7, 1967, a holder of 200 shares of Old Kern stock brought a state court action in Midland County, Texas, to enjoin the consummation of the Tenneco-Old Kern plan; the plaintiff obtained a temporary restraining order the same day. The court thereafter dissolved the temporary restraining order and denied plaintiff's motion for a preliminary injunction. Similar suits, initiated by the same plaintiff, his company, Harjean Co., or his close associates, were brought on August 16 in the United States District Court for the Northern District of California; on August 17 in the United States District Court for the District of Nebraska, where the plaintiff obtained a temporary restraining order on August 22; and in the County Court of rural Knox County, Texas, where the plaintiff Harjean Co. obtained a temporary restraining order prior to August 22.

In a suit brought on August 23 in Midland County, Texas, in an effort to put an end to these suits, Tenneco, Old Kern and New Kern obtained an *ex parte* order enjoining Occidental and the defendants who had initiated the previous suit seeking to delay the closing of the Plan, from taking any further action in those suits except to have them dismissed. Plaintiffs agreed to a nonsuit in this action after the closing of the Tenneco-Old Kern transaction on August 30, 1967.

This spate of litigation was reviewed by Judge Brewster of the United States District Court for the Northern District of Texas in the case of 600 California Corp. v. Harjean Co., 284 F.Supp. 843 (1968). In reference to the various suits the court said that the stockholder group of plaintiffs

> has been determined to keep multi-forum litigation going constantly over a widespread area for the purpose of delaying the consummation of the plan, if not to defeat it, knowing all the time that they had no chance of winning the litigation. 284 F.Supp. at 856.

Judge Brewster found that Occidental was the moving force behind this litigation and that this repetitious litigation in different courts of the country was oppressive and vexatious to Tenneco and Old Kern. 284 F.Supp. at 861.

In any event, by August 30, 1967, all obstacles to the Tenneco-Old Kern closing arising from these suits had been abated, with the exception of the restraining order issued by the Knox County Court, and the plaintiffs in that suit were enjoined from taking any action in the case except to have it dismissed.

15. The Tenneco-Old Kern Plan was presented to the Old Kern shareowners at a stockholders' meeting on July 17, 1967. The board of directors, in the proxy statement sent to Old Kern stockholders in relation to the meeting, strongly urged approval of the Plan, and prior to the meeting date had received sufficient proxies to ensure adoption of the Plan regardless of Occidental's position.

Occidental, in a letter dated July 14 and read at the July 17 meeting, chose not to oppose the Plan and stated that its decision had been reached prior to the June 2 option agreement with Tenneco Corporation. While refraining from voting its shares at the July 17 meeting, Occidental went to pains to indicate that it did not view the Plan as unfair or inequitable to Old Kern stockholders and that, if it had the right to an appraisal, it would not exercise such right but rather would vote in favor of the sale of assets.

The Plan was easily approved by Old Kern's stockholders at the July 17 meeting.

16. The Internal Revenue Service issued on August 4, 1967, the ruling sought by Tenneco and Old Kern, indicating that the consummation of the Plan would result in a tax free exchange with no taxable gain or loss to the shareholders of Old Kern. Application to the California Commis-

sioner of Corporations was made immediately to secure the necessary permits and authorizations for the closing, but action was put off when the Commissioner was informed of the first stockholder suit brought in Texas. Occidental directed a 14-page letter to the Commissioner on August 11, 1967, arguing against the Commissioner's approval of the transaction. Nevertheless, the necessary approvals were given on August 30, 1967.

17. On the same date as approval was received from the Commissioner of Corporations, August 30, 1967, the closing of the Tenneco-Old Kern Plan was held in San Francisco. Old Kern's name was changed to 600 California Corporation, and an election to wind up and dissolve was filed by Old Kern with the California Secretary of State. All of the assets and business of Old Kern were transferred to New Kern, and Old Kern deposited the shares of new Tenneco preference stock it received with the designated exchange agent. Irrevocable instructions were given the exchange agent for distribution of the Tenneco stock to Old Kern shareholders upon receipt of their Old Kern shares.

As part of the closing, Old Kern on August 30, 1967, issued to New Kern, pursuant to the Plan, a document irrevocably transferring and assigning to New Kern

> all claims, demands, rights and choses in action accrued or to accrue under and by virtue of the Securities Exchange Act of 1934 * * * and all of the rules and regulations promulgated by the Securities and Exchange Commission to the date hereof.

18. On August 31, 1967, Old Kern sent a letter to all stockholders announcing that the closing had occurred the previous day and that Old Kern shareowners were then irrevocably entitled to receive the new Tenneco stock; the

procedure for receipt of the new Tenneco shares was indicated. On October 6, 1967, a certificate of dissolution was filed with the California Secretary of State. Trading was continued in the Old Kern stock on the New York and Pacific Coast exchanges until October 13 and October 16, 1967, respectively. The new Tenneco stock was to be registered by December 31, 1967, but the stock could be traded before that date in the over-the-counter market.

19. On December 11, 1967, by letter hand-delivered to the exchange agent, Occidental tendered its shares of Old Kern stock certificates, a total of 887,549 shares, including the 1900 shares purchased in April, 1967, on which no Section 16(b) liability is premised in the instant suit, for conversion into a like number of shares of the Tenneco preference stock. On the same day, a closing was held between Tenneco Corporation and Occidental under the option agreement of June 2, 1967. Occidental received a total of $93,095,415, which included the $8,866,230 previously paid by Tenneco Corporation on the option.

The Tenneco preference stock was registered with the SEC on December 28, 1967.

20. On or about September 21, 1967, Occidental received a dividend from New Kern of $575,671.85 payable on its holding of Old Kern stock. Occidental also received, on or about January 9, 1968, a dividend in the amount of $1,217,767.37 payable for the final quarter of 1967 on the new Tenneco preference stock.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter of these actions. Securities Exchange Act of 1934 §§ 16(b), 27, 15 U.S.C. §§ 78p(b), 78aa.

2. At all times relevant herein, up to and including August 30, 1967, the capital stock of Old Kern, a class of nonexempted equity security, was registered on the New York and Pacific Coast stock exchanges pursuant to Section 12 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78*l*.

3. On May 8, 1967, Occidental made a public tender offer to purchase for cash up to 500,000 shares of the said capital stock of Old Kern at a price of $85.00 per share; and on May 11, 1967, Occidental increased its public tender offer to encompass 1,000,000 shares. As a result of the aforesaid tender offer and between May 8, 1967 and June 8, 1967, Occidental purchased and became the beneficial owner of 885,649 shares of the capital stock of Old Kern; these shares, when coupled with 1900 shares purchased by Occidental in April, 1967, gave Occidental ownership of a total of 887,549 shares of Old Kern capital stock.

As of May 10, 1967, Old Kern had 4,328,140 shares of capital stock issued and outstanding. By that date, Occidental had acquired more than 500,000 shares of the Old Kern stock; it had thus become, by way of the single tender offer, the beneficial owner of more than 10 per cent of the capital stock of Old Kern, i.e., a statutory insider within the meaning and purview of Section 16(b). The tender offer constituted a single act of Occidental, whereby the company became a beneficial owner of more than 10 per cent of Old Kern's capital stock. Stella v. Graham Paige Motors Corp., 232 F.2d 290, 300 (2d Cir.), cert. denied 352 U.S. 831, 77 S.Ct. 46, 1 L.Ed.2d 52 (1956); see Newmark v. RKO General, Inc., 425 F.2d 348 (2d Cir. 1970), cert. denied 400 U.S. 854, 91 S.Ct. 64, 27 L.Ed.2d 91 (1970); Kahansky v. Emerson Radio & Phonograph Corp., 184 F.Supp. 90, 94 (S.D. N.Y. 1960).

4. On June 2, 1967, Occidental concluded an option agreement with Tenneco Corporation; under the terms of the agreement Occidental granted Tenneco an option to purchase the shares of Tenneco preference stock which Occidental would receive upon consummation of the Tenneco-Old Kern Plan, by virtue of its holdings of Old Kern stock. The purchase price of the option agreement was $93,095,415.00. In consequence of the option agreement, Occidental disposed of its holdings in Old Kern stock at a profit of about $20 per share, amounting to a total profit of $17,712,980 attributable to the purchase and disposition of the 885,649 shares acquired through the May, 1967, tender offer. This profit falls within the meaning and purview of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), and is recoverable in the present litigation. Blau v. Lamb, 363 F.2d 507, 516 (2d Cir. 1966), cert. denied, 385 U.S. 1002, 87 S.Ct. 707, 17 L.Ed.2d 542 (1967); see, Emerson Electric Co. v. Reliance Electric Co., 306 F.Supp. 588, 591 (E.D.Mo. 1969), modified on other grounds, 434 F.2d 918 (8th Cir. 1970); Bershad v. McDonough, 300 F. Supp. 1051 (N.D.Ill. 1969); Blau v. Allen, 163 F.Supp. 702 (S.D.N.Y. 1958).

5. At the closing when Occidental became irrevocably entitled to receive shares of the newly issued Tenneco preference stock having a value to Occidental, because of the option agreement, of $105 per share, in exchange for its holdings of Old Kern stock, Occidental realized a profit within the meaning of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), of $17,712,980.00. Blau v. Lamb, *supra;* Blau v. Mission Corp., 212 F.2d 77, 80 (2d Cir.), cert. denied, 347 U.S. 1016, 74 S.Ct. 872, 98 L.Ed. 1138 (1954); Smolowe v. Delendo Corp., 136 F.2d 231, 235-237 (2d Cir.), cert. denied, 320 U.S. 751, 64 S.Ct.

56, 88 L.Ed. 446 (1943); Newmark v. RKO General, *supra;* see, Booth v. Varian Associates, 334 F.2d 1 (1st Cir. 1964), cert. denied, 379 U.S. 961, 85 S.Ct. 681, 13 L.Ed.2d 556 (1965); Marquette Cement Mfg. Co. v. Andreas, 239 F.Supp. 962 (S.D.N.Y. 1965); Blau v. Hodgkinson, 100 F.Supp. 361 (S.D.N.Y. 1951).

6. By reason of the aforesaid transactions, Occidental engaged in a purchase and sale and realized profits recoverable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

7. By virtue of the terms of the Tenneco-Old Kern Plan, and of the terms of the specific assignment from Old Kern to New Kern on August 30, 1967, of all actual and potential claims arising under the Securities Exchange Act of 1934, any amounts recovered in this litigation inure and belong to New Kern. Newmark v. RKO General, *supra;* Western Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736 (8th Cir. 1965), cert. denied 382 U.S. 987, 86 S.Ct. 556, 15 L.Ed.2d 475 (1966). See Emerson Electric Co. v. Reliance Electric Co., *supra.*

8. New Kern is entitled to recover from Occidental the sum of $17,712,980, constituting profits recoverable under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). The transactions which give rise to this conclusion may be spelled out as follows:

(1) Occidental purchased through its public tender offer in May, 1967, 885,649 shares of Old Kern stock at $85.00 per share, for a total purchase price of $75,280,165.

(2) On June 2, 1967, within six months of its May purchase of more than 10% of Old Kern stock, Occidental, by

way of the option, disposed of 886,623 of its shares of Old Kern stock for a total payment of $93,095,415, or $105 per share.

(3) On August 30, 1967, within six months of its May purchase of more than 10 per cent of Old Kern stock, Occidental became entitled to receive, in exchange for its holdings of Old Kern stock, 887,549 shares of the Tenneco preference stock, which Occidental valued at $105 per share in its option agreement of June 2, 1967.

(4) The total value Occidental received, either by way of the option agreement or by way of the August 30 closing, with respect to the 885,649 shares purchased in the May tender offer, was $92,993,145, exclusive of two dividends hereinafter referred to.

(5) For the purposes of Section 16(b), 15 U.S.C. § 78(b), Occidental thus reaped a profit, when the sale price of $92,993,145 is matched with the purchase price of $75,280,165 for the 885,649 shares of Old Kern involved, of $17,712,980, or $20 per share.

These transactions may be summarized schematically as follows:

I.	PURCHASE:		
	April, 1967		1,900 shares
	May and June, 1967 at	885,649 shares $85 per share	885,649 shares
	Price of shares acquired through May tender	$75,280,165	
	Total shares owned as of June 8, 1967		887,549 shares

II. DISPOSITIONS:

1) Option agreement

886,623 shares sold for $93,095,415 ($105 per share)

Amount received with respect to shares acquired in May 1967 tender offer	885,649 shares x$105 rec'd per sh. $92,993,145 Total

2) Closing

Per share value of Tenneco preference stock, derived from June 2, 1967 option	$105 per sh.
Shares acquired in May and disposed of through closing	885,649
Total value received with respect to these shares	$92,993,145

III. PROFITS:

Amount received for 885,649 shares	$92,993,145
Amount paid for these shares	75,280,165
Profit	$17,712,980
Per Share Profit	$20

(a) Interest shall be paid by Occidental on $17,712,980 as follows: Interest on $886,623 received by Occidental on June 2, 1967, is to be paid as of that date; interest on the $7,979,607 balance of the down payment received by Occidental on June 9, 1967, is to be paid as of that date; and interest on the remaining $8,846,750 paid on December 11, 1967, is to be paid as of that date. Blau v. Lehman, 368 U.S. 403, 414, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); Adler v. Klawans, 172 F.Supp. 502, 506 (S.D.N.Y. 1958).

(b) The amounts of the two dividends payable to Occidental for the third and fourth quarters of 1967 by reason of its ownership of the Old Kern and Tenneco stock, $575,671.85 and $1,217,767.37, respectively, may be recoverable by New Kern under Section 16(b) of the Securities Exchange Act of 1934. Blau v. Lamb, *supra;* Western Auto Supply v. Gamble-Skogmo, Inc., *supra;* Marquette Cement Mfg. Co. v. Andreas, *supra,* 239 F.Supp. at 968. No conclusion is reached, however, with respect to the inclusion of either dividend as part of the recovery herein provided. This aspect of the case has not been sufficiently developed or briefed. Since the law with respect to the recovery of dividends under Section 16(b) is in some respects unsettled and provides no facile rule of application (see, Adler v. Klawans, *supra;* Western Auto Supply v. Gamble-Skogmo, Inc., *supra;* 21 U.Pitt.L.Rev. 554, 557 (1960); 45 Va.L.Rev. 1057, 1060 (1959)) decision is reserved with respect thereto. The parties may file and exchange additional papers and briefs 30 days from the date hereof.

9. The affirmative defenses and counterclaims interposed by Occidental, with respect to which New Kern seeks a dismissal, are without merit. Occidental's defense that its acquisition of Tenneco preference stock was involuntary cannot be sustained, for reasons heretofore advanced in this opinion. Since Occidental's acquisition of more than 10% of Old Kern's common stock was unquestionably voluntary, Occidental thereby voluntarily assumed the obligations and burdens of a statutory insider under Section 16(b). See Western Auto Supply Co. v. Gamble-Skogmo, Inc., *supra;* Alloys Unlimited, Inc. v. Gilbert, 319 F.Supp. 617 (S.D.N.Y. 1970). Similarly, Occidental's defenses of unclean hands and estoppel must be dismissed, the courts having repeatedly held that issuers cannot waive or by their conduct estop themselves or their stockholders

from enforcing rights granted them under 16(b) for the benefit of the investing public. See, Magida v. Continental Can Co., 231 F.2d 843, 846 (2d Cir.), cert. denied 351 U.S. 972, 76 S.Ct. 1031, 100 L.Ed. 1490 (1956); Volk v. Zlotoff, 285 F.Supp. 650, 655-656 (S.D.N.Y. 1968); Marquette Cement Mfg. Co. v. Andreas, *supra,* 239 F.Supp. at 966, *and cases cited therein;* Jefferson Lake Sulphur Co. v. Walet, 104 F.Supp. 20 (E.D.La. 1952), aff'd 202 F.2d 433 (5th Cir.), cert. denied 346 U.S. 820, 74 S.Ct. 35, 98 L.Ed. 346 (1953).

(a) New Kern's motion for summary judgment is granted. Judgment is awarded against Occidental Petroleum Corporation for $17,712,980.00, with interest at the rate of 6% per annum as follows: on $886,623 received by Occidental on June 2, 1967, interest is to be paid as of that date; on the $7,979,607 balance of the down payment received by Occidental on June 9, 1967, interest is to be paid as of that date; and on the remaining $8,846,750 paid on December 11, 1967, interest is to be paid as of that date. Decision on the recovery of dividends is reserved as set forth herein.

(b) The motions of the plaintiff stockholders in Actions Nos. 1, 2 and 4 are denied, solely because they are deemed moot in the light of the recovery awarded to New Kern.

(c) The motions of Occidental are denied with prejudice. Occidental's affirmative defenses numbered 1 through 7, and Occidental's counterclaims numbered 1, 2, 3 and 7 are dismissed with prejudice.

It is the intention of the Court to direct entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure upon the disposition of the dividend issues.

SUPPLEMENTAL OPINION

January 27, 1971

This decision is intended to settle a matter left open in this Court's opinion of November 27, 1970. What follows assumes a familiarity with that opinion. Occidental Petroleum Corporation has been held accountable to plaintiff Kern County Land Company (New Kern) pursuant to Section 16(b) of the Securities Exchange Act of 1934 for short swing profits realized on the purchase and sale of securities. Decision was reserved as to whether dividends paid to Occidental pursuant to its option agreement with Tenneco Corporation are includable in New Kern's recovery.

The dividends in question include $575,671.85 paid as the regular third quarter dividend of Old Kern on September 21, 1968, and $1,217,767.37 paid as the initial quarterly dividend on the Tenneco Preference Stock on January 9, 1968, a total amount of $1,793,439.22. This Court finds both dividends are recoverable by New Kern for the reasons stated herein.

Both dividends in question were expressly contracted for in the June 2 option agreement between Occidental and Tenneco (opinion at p. 576). The dividend on the Old Kern stock is clearly recoverable under the views expressed in Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959) and its progeny. While denying recovery of insider dividends in that case because no profit had in fact been realized on the overall transaction, that court clearly implied that insider dividends would ordinarily be recoverable. See 21 U.Pitt.L.Rev. 554, 557 (1960). Such profits were expressly held recoverable in Marquette Cement Manufacturing Co. v. Andreas, 239 F.Supp. 962 (S.D.N.Y. 1965) and Western Auto Supply v. Gamble-Skogmo, Inc., 348 F.2d

736 (8th Cir. 1965), cert. denied 382 U.S. 987, 86 S.Ct. 556, 15 L.Ed.2d 475. Thus, this dividend declared during the period of Occidental's "insidership" come within the purview of this line of cases.

The question of the recovery of dividends on the Tenneco Preference Stock presents a different problem and one considered for the first time, we believe, by any court. The dividend on the Tenneco Preference Stock was provided for in Tenneco's Certificate of Incorporation and not subject to the kind of insider manipulation cited in *Adler, supra.* However, where such a dividend is expressly contracted for regardless of the record ownership of the stock in question, other opportunities for abuse are present. Several examples are cited in counsel's briefs, the most obvious being the situation where parties contract for a low sales price (resulting in a small capital gain) with the retention of future dividends by the seller. The purpose of the statute could be completely thwarted by arrangements of this kind.

Thus, judgment is awarded to New Kern in the amount of $1,793,439.22, interest on $575,671.85 to run from September 21, 1967, and interest on $1,217,767.37 to run from January 9, 1968.

This Court is disposed to direct the entry of a final judgment pursuant to Fed.R.Civ.P. 54(b). Parties are given fifteen days from the date of this decision to submit briefs setting forth any reasons why a final judgment should not be entered at this time, and particularly, whether the 4th, 5th and 6th counterclaims asserted by Occidental should bar the express direction of finality contemplated by Fed.R.Civ.P. 54(b).

It is so ordered.

SECOND SUPPLEMENTAL OPINION

February 18, 1971

The judgment filed today in favor of New Kern contains an express direction of finality as contemplated by F.R.Civ.P. 54(b). No persuasive reason has been found for staying the entry of final judgment because of the 4th, 5th and 6th counterclaims asserted by Occidental. Additionally, there is a special appropriateness in entering a final appealable judgment with respect to all the causes of action and counterclaims arising under Section 16(b) of the Securities Exchange Act of 1934.

The 4th, 5th and 6th counterclaims asserted by Occidental have remained moribund throughout this litigation. They have never been pressed by discovery or any other action. Indeed, their presence in this litigation is the result of somewhat fortuitous circumstances and stems from claims made in an independent action brought by Occidental in the United States District Court in the Northern District of California against New Kern, Tenneco, Inc. and two officers of Old Kern. In the earlier stages of the case before this court and during its pendency before the late Judge Herlands, the California action was stayed and Occidental was given leave to interpose counterclaims "equivalent to the claims presently embodied in its California action." The essence of these counterclaims is Occidental's allegation that the assets of Old Kern were worth some $125 per share and that they were transferred to New Kern for in excess of $25 per share less than their fair value. The record before this court contains many documented facts from which contrary inferences can be drawn. Indeed the contemporaneous evaluations made by Occidental itself are not consonant with this allegation. See this court's opinion of November 27, 1970, at page 18 [15C]. Additionally, the

charge of undervaluation has been made in collateral litigation in Texas, Nebraska and California and always with the same result. The allegation was considered to present little likelihood of success. See 600 California Corporation v. Harjean Company, 284 F.Supp. 843 (N.D.Texas 1968); C.M.C. Corporation v. Kern County Land Company, 290 F.Supp. 695 (N.D.Cal.1968).

It is difficult to conclude from what has just been said that the asserted counterclaims have been anything more than tactical positions of Occidental in this litigation.

Apart from what has been said there are independent overriding reasons why these counterclaims should not bar a finding of finality with respect to the judgment entered herewith. As already indicated, this judgment deals exclusively with Occidental's liability for insider profits under Section 16(b) of the Securities and Exchange Act of 1934. This statutory provision is expressive of a strong public policy to "prevent 'unfair use of information' by insiders and thereby to protect the public and outside stockholders." [Quoting 15 U.S.C. § 78p(b)]. Feder v. Martin Marietta Corp., 406 F.2d 260, 262 (2d Cir. 1969), cert. denied, 396 U.S. 1036, 90 S.Ct. 678, 24 L.Ed. 2d 681 (1970). There is no comparable public interest affecting the 4th, 5th and 6th counterclaims. They are plainly private claims for monetary damages inuring to Occidental. To delay entry of this judgment pending resolution of Occidental's counterclaims would stultify the public policy embodied in Section 16(b).

It is noteworthy in this connection that during the course of the transactions which constitute the factual background of this lawsuit, Occidental sought unsuccessfully to obtain a ruling from the Securities and Exchange Commission exempting it from any liability under Section 16(b). See opinion of November 27, 1970, page 4 [4C].

Under the circumstances presented by the undisputed facts of this case, there is no persuasive reason for denying the motion of New Kern under Rule 54(b) in the form substantially proposed by it.

In fixing interest on the judgment at the rate of 7½% this court accepts and follows two recent decisions by Judge Tyler and by Judge MacMahon of this court. Lee National Corp. v. Kansas City Southern Industries, Inc., 50 F.R.D. 412, 414 (S.D.N.Y.1970); Rock Transport Properties Corp. v. Hartford Fire Insurance Co., 312 F.Supp. 341, 348-349 (S.D.N.Y.1970); *cf.*, Caldecott v. Long Island Lighting Co., 417 F.2d 994 (2d Cir. 1969).

Lastly, Occidental has expressed its intention to appeal from any judgment entered against it, and requests a stay "without supersedeas bond pending the final determination of its remaining counterclaims." This request is denied.

Since both New Kern and Occidental dispose of abundant assets, and since the judgment about to be entered in favor of New Kern, despite its substantial size, can be met by Occidental, a stay is granted pending the disposition of the appeal of the 16(b) issues only and on the following conditions: that Occidental file its notice of appeal within ten (10) days of the date of filing of the judgment; that Occidental post a supersedeas bond in the sum of one million dollars; and that Occidental pursue its appeal with the utmost diligence.

Appropriate judgments are filed herewith in the New Kern case and in the companion cases rendered moot by the New Kern decision.

THIRD SUPPLEMENTAL OPINION

February 22, 1971

To avoid any possible misunderstanding regarding the judgment rendered in this matter on February 18, 1971, this memorandum, to be considered a supplement to the opinion of the court filed on February 18, 1971, is intended to make clear that the court's rejection of a proposed judgment reserving its jurisdiction over attorneys' fees must not be understood to be a decision as to the merits of that issue. It was not thought necessary to make an express reservation of decision as to attorneys' fees since the court retains jurisdiction of this litigation for all purposes pursuant to the individual assignment program. The matter will be decided in due course and when the litigation is in an appropriate posture for such decision.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1059

KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Occidental Petroleum Corporation ("Occidental") submits this memorandum in opposition to the petition filed by "New Kern" for review of a decision by the Court of Appeals for the Second Circuit in regard to certain events involving the parties, petitioner's predecessor ("Kern") and its present corporate parent ("Tenneco") under § 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78p(b)) (the "Act").*

Questions Presented

1. Whether, on the facts of this case, the grant of a long-term option, which could not and did not result in a sale within six months, was a short-term "sale" of securities subject to the option under § 16(b).

* References herein by page number are in the form set forth in the petition.

2. Whether, on the facts of this case, the forced transformation of stock by a "defensive merger" engineered by petitioner's predecessor and its parent must be imputed to respondent as its "sale" under § 16(b), when such transformation involved no opportunity for abuse of "inside" information.

Proceedings Below

This case is one of four actions, including three shareholder actions, which were consolidated for discovery, 44 F.R.D. 543 (S.D.N.Y. 1968), in which all parties participated. Each plaintiff moved for summary judgment. The district court granted petitioner's motion and dismissed the three shareholder actions as moot (24C); no appeal was taken by those parties.

On respondent's appeal the Court of Appeals for the Second Circuit, in an opinion by Chief Judge Friendly, unanimously reversed and directed dismissal of the complaint in accordance with respondent's explicit request on brief and at argument. The panel, which included a former general counsel of the Securities and Exchange Commission, also unanimously denied petitioner's application for rehearing. The full active membership of the Second Circuit denied petitioner's application for rehearing and for rehearing in banc by a vote of eight to one.

Petitioner's current contention that factual development of this case was "limited", and thus that the court below dismissed it prematurely, came only after the uncontested facts yielded a result unsatisfactory to it. In the opening of its appellate brief petitioner told the court:

> [E]ntry of summary judgment came after this litigation had been pending some three years and after extensive discovery had been had, . . .[a]

[a] Brief for Appellees at 2-3, *Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157 (CA 2 1971) (Aug. 16, 1971).

and at two points carefully listed the pretrial discovery taken,[b] pressing the position that the case was ripe for decision, until the Court of Appeals ruled. (17A)

Reasons for Denying the Writ

Contrary to petitioner's contention, this case does not present any broad issue of law. The decision required only the application of principles announced in *Blau* v. *Lehman*, 368 U.S. 403 (1962), again recently endorsed in *Reliance Electric Co.* v. *Emerson Electric Co.*, No. 70-79, 404 U.S.— (Jan. 11, 1972), and followed in the Second Circuit and elsewhere, to the particular facts here. That application was entirely correct.

The court below, following a well established test, held that the forced transformation of a defeated bidder's shares into those of another corporation in a merger wholly within the control of others is not a "sale" by such bidder, and no § 16(b) liability follows, provided that the transactions do not permit the abuse of inside information. The test, which petitioner concedes to be the correct one, requires a careful examination of the facts and the sequence and timing of events. It has been and must hereafter be applied on a case-by-case basis. A decision on the facts of this case cannot resolve future merger cases, "defensive" or otherwise. In addition, as set forth *infra*, more sophisticated "defensive" techniques, creating no § 16(b) questions, would appear to have overshadowed the "defensive" merger. The rare occasion where a hostile management will procure and rush through a merger within six months, as was done here, does not merit plenary consideration. Even in such unusual situations, the result urged by petitioner would allow such managements to destroy the "delicate balance"

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b *Id. at* 3, 20.

in tender offer contests which Congress, in passing legislation[c] after the events herein, took care to preserve.

Similarly, the Court of Appeals' holding that the mere grant of an option, economically bona fide, is not a § 16(b) "sale" accords with an unbroken line of prior decisions. The grantor of an option has no power to effect any sale, but rather leaves his investment at risk in the issuer's securities. A sale occurs only when and if the optionee exercises, and here no sale was made within the statutory period. There is no conflict here with the Seventh Circuit's decision in *Bershad* v. *McDonough*, 428 F.2d 693 (CA 7 1970), *cert. denied*, 400 U. S. 992 (1971), meticulously analyzed in Judge Friendly's opinion, where the "option" was a sham. Both courts, on summary judgment, applied the same principles to different facts with different results.

The contention that this part of the decision opens an "escape hatch" from § 16(b) is based upon inaccurate statements as to the mechanics of and risks inhering in the grant of a long-term option, which can assure no profit of any kind but rather encumbers its grantor. It is, as shown herein, an "escape hatch" only from nonexistent liability. The Second Circuit has given fair warning that spurious "options" will allow an insider no escape.

Petitioner's primary ground for review is apparently that a profit (long-term) was made. The question is not whether a profit was made but whether § 16(b) applies. *Reliance Electric Co.* v. *Emerson Electric Co., supra.* The Court of Appeals, applying accepted principles, reached the only proper result on the facts by denying windfall recovery to the petitioner, where neither the purpose nor the mechanics of § 16(b) had any application, and the court below was not therefore pressed to a result which would have been "repugnant" to its "sense of equity" (13A). There is no need for review.

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[c] The Williams Act Amendments to the Act, see p. 26 *infra*.

Counterstatement of Facts

Petitioner's statement omits so many facts relevant to the propriety of review that it is necessary to submit this counterstatement.

A. *Occidental's attempt to arrange a merger with Kern.*

In late March of 1967 Occidental discussed a possible Kern merger with Lehman Brothers, Occidental's investment banker, which viewed it as beneficial for both companies (722a). After unsuccessful attempts in April 1967 to schedule a meeting with Kern (550a; 762a), Occidental on May 8 released the terms of a public tender offer to Dow Jones for publication over the "broad tape", followed the next day by newspaper publication (763a).

Occidental offered to purchase up to 500,000 shares of Kern stock for $83.50 per share plus $1.50 commission to transmitting brokers. The offer was unconditional and irrevocable until June 8, 1967, requiring Occidental to accept all tenders, however few (450a, Ex. a; 759a-760a). Occidental reserved the right to purchase, in order of receipt, some or all shares tendered beyond 500,000 and the right to extend the offer on public notice (*id.*). The offering price of $83.50 was approximately $20—or 30%—above the prior closing market price (63⅝) of Kern Stock (763a) and was set with Lehman Brothers' guidance, based upon published data (723a-724a). Within 2½ days after announcement tenders exceeded 500,000 shares, and on the third day an irrevocable extension for an additional 500,000 Kern shares was made (767a; 1061a).

On the day of the offer Kern's board of directors met specially and determined to "use every legitimate means to

frustrate Hammer's[d] ambition to take over your Company [Kern]" (782a). Kern wrote to its shareholders on May 10, urging them not to tender, stating, *inter alia*, that it had "in hand . . . a number of offers to discuss merger possibilities . . . that could result in tax-free exchanges" (782a-785a), which statement was then untrue. Kern had no other offers (805a; 901a; 772a; 724a; 655a; 645a). Upon the extension of the offer it telegraphed, and thereafter again wrote to each shareholder, urging defeat of the offer. (785a; 768a).

Despite Kern's active resistance (1062a; 769a) Occidental sought to discuss a consensual merger. Occidental submitted two merger proposals, each on a "negotiable" basis, but Kern refused to discuss them (644a-645a; 658a; 769a). Late on May 19 Kern announced that its board had voted to accept a Tenneco merger offer[e] and told Occidental to "read about in in the newspapers." (770a).

The news release (787a-788a) revealed that the Tenneco offer, accepted "unanimously," was a tax-free, share-for-share exchange of Kern stock for a proposed $5.50 Tenneco convertible preference stock with a liquidation value of $100, a cumulative dividend of $5.50 per share and callable in ten years at $110. Lehman Brothers advised that the Tenneco proposal was worth $105 per share (745a), or 23% above Occidental's own offer; Occidental made public this valuation by announcement to its shareholders dated May 19 (710a, Ex. D at D7-D8).

Tenneco was first contacted by Kern on May 10 or 11 when Kern's Chairman (Montgomery) asked Tenneco's late Chairman (Symonds) to come up with an offer to

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d President of Occidental.

e Although the Tenneco-Kern transaction was styled as an exchange of stock for assets, see note o and p. 11 *infra*, the term "merger" is used here for shorthand purposes.

counter Occidental (726a-727a; 772a; 805a). Tenneco insisted upon studying Kern's records (725a) and on May 11 commenced a detailed examination, working from an office within Kern. No earlier than May 16, 1967 Tenneco and Kern met "for a general discussion of the framework within which Tenneco might make an offer," subject to further inspection (727a-728a). Tenneco had access to inside information, and its offer was based thereon (726a-728a). Occidental was isolated throughout (728a; 772a-773a).

B. *Aftermath of Tenneco's Offer; the Option Agreement.*

The May 19 announcement of the Kern-Tenneco agreement put an end to Occidental's bid, which after May 19 drew only a few shares on scattered dates through June 5 (771a). It was clear to Occidental that, even if it waged a costly and bitter proxy fight, it was not likely to stop the proposed Tenneco-Kern merger (729a).[f] Occidental and Tenneco met in late May and attempted to cope with the prospect, viewed unfavorably by both (729a, 730a), that Occidental, having sought to acquire Kern, would ultimately become a minority shareholder of Tenneco. They considered the possible sale of Occidental's Kern shares to Tenneco, but believed this could not be done in view of the "possibility of a 16B problem" (730a).

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f With a $75 million investment at stake, Occidental thereafter made a demand upon Kern to examine its corporate records, was repeatedly refused, and was forced to institute two state court actions in an attempt to secure an unqualified right equally available to any shareholder under Cal. Corp. Code § 3003 (West 1955) (669a-670a; 678a-681a; 849a-867a). Only after these proceedings were instituted did Kern produce any records, which did not go beyond that available to any shareholder (4A), and none related to the value of the Tenneco offer (773a). What was made available to Occidental is irrelevant; the question is whether the merger exchange allowed Occidental to use it unfairly. See Point II *infra*.

At the suggestion of the late Mr. Symonds, Occidental,[g] along with its counsel, Pillsbury Madison & Sutro, met with Tenneco[h] and its counsel, Cahill Gordon Sonnett Reindel & Ohl, on June 1, 1967 at the latter's New York office (731-734a; 584a-585a). The parties entered into an agreement whereby Occidental, both to comply with § 16(b) and to qualify for capital gains treatment under the Internal Revenue Code, if the shares were later sold (737a; 732a), agreed not to dispose of its investment for at least more than 6 months, and for up to 14 months, beyond June 8, 1967[i] (464a). For a period beginning after December 9, 1967 and up to July 31, 1968, depending upon when Tenneco and Kern chose to close the merger, if they did, Tenneco Corporation (Tenneco's subsidiary) would have a transferable right to purchase not Occidental's Kern shares but the then nonexistent preference shares which might come to Occidental if the merger were effected (462a-463a). Occidental had no right to compel Tenneco or any transferee to purchase such shares at any time. Tenneco would pay for this "call" option, but if no merger occurred by July 31, 1968 (14 months later) Occidental would return the option "premium" paid (461a-465a).

From the meeting a call was made to Donaldson Lufkin & Jenrette, Inc., a New York investment house with expertise in the option market, to determine the current price of a "call" on shares selling in the range of the Kern shares, then trading in the mid-90's. It advised that the premium for a six-month call varied from $9 to $12 per share, depending upon the inclusion of conditions outside a standard call

g By Walter R. Davis, then Executive Vice President of Occidental (555a).

h By the late Mr. Symonds. (*Id.*)

i Because the tender offer was irrevocable until June 8, Occidental might theoretically receive more tenders until that date.

contract (747a-748a; 556a-557a; 776a). Despite the extended holding period and refund provisions the premium was placed low in the range suggested at $10. The stated option price was $105, but the premium was to be creditable against the stated price, making the effective exercise price $95 per share (790a; 462a), which was not below current market.

Both parties were unfamiliar with the technicalities of § 16(b) and relied upon their attorneys (731a-734a), who agreed upon the option (743a-744a). The negotiators were advised,[j] as later was Kern, that the grant of an option to Tenneco was not within § 16(b) (733a-734a; 737a-738a; 744a). The agreement was executed on June 2, 1967.

Tenneco also promised to postpone the listing and registration of the proposed Tenneco preference shares under § 12 of the Act until the option either was exercised or expired.[k] In mid-June steps were taken to do so, and based thereon Occidental moved to dismiss its actions for inspection of Kern's records (510a-512a).

The option agreement was not conditioned explicitly or implicitly upon Occidental's either supporting or not opposing the proposed merger (750a-751a) and was executed well after public release of the May 19 merger announcement. The Kern proxy statement of June 16, preliminary to the special shareholders' meeting, set forth the substance of the option agreement and stated that Tenneco Corporation "has not determined whether it will exercise its option, . . . Depending on future investment market conditions, Tenneco Corporation may sell the option or

j Based on this advice Kern and Tenneco set forth the terms of the option in the proxy statement of June 16, 1967, but made no suggestion that it might give rise to a § 16(b) claim (736a-738a).

k This was to remove the proposed Tenneco shares from § 16(b) and to avoid a claim that a double holding period was required and is explained in the Court of Appeals' decision (5A-6A n.6).

the Preference Stock covered by the option; its present intention is not to purchase such Preference Stock as an investment." (980a, Ex. I at 3).

Petitioner fails to indicate that Tenneco Corporation never exercised its option. On August 16, before the merger was effected, the option was sold by Tenneco Corporation to Loeb, Rhoades & Co. for at least the price it had paid Occidental (557a; 414a),[l] and the option was subsequently transferred to the LR Fixed Invetment Trust (247a; 265a; 414a).

C. *Efforts to Obtain a Rule "16b-11" from the SEC*

To deal with the problem that the Kern-Tenneco merger might itself be alleged to be a § 16(b) "sale", Occidental proposed to apply to the SEC for a rule of general application which would exempt a merger within six months of acquisition by public tender offer from § 16(b), (512a-513a; 433a; 1067a), and Tenneco agreed to aid in the application (570a-572a).[m] Occidental also believed it had received Tenneco's assurance to delay the closing if the administrative application were unsuccessful (777a-779a; 735a-737a; 269a; 520a-522a); although Tenneco had assured full cooperation to avoid acts which might trigger

l The call was sold to qualify the merger for tax-free treatment under an IRS ruling (557a).

m The Pillsbury firm sent copies of the proposed rule and other related material to petitioner's counsel (433a). One letter recounted the reaction of Phillip Loomis, Jr. of the SEC: "He was sympathetic. He was most impressed by the fact that the only alternative that Occidental had was to commence every kind of litigation it could reasonably bring and attempt to forestall the consummation of the Tenneco-Kern transaction for six months." (571a) On the basis of this communication petitioner apparently claims that Occidental had decided to initiate litigation in the event of a failure of efforts at the SEC (Petition at 8 n). Petitioner's reference to litigation undertaken to stop the merger omits to state that the closing of the merger took place in violation of an injunction issued by a court of the State of Texas (817a), also contrary to the Plan of Merger (456a at A-18, A-21).

§ 16(b) liability (734a; 740a), this aspect of the agreement was disputed and played no role in the decision below (17A).

On July 12 the SEC declined "at the present time" to publish a rule for comment. A revised rule was submitted, but the SEC again declined to take any action with regard to the application (1067a), expressing no view as to the merits of this particular case.[n]

D. *The Plan of Merger (the "Plan")*

The Plan (456a, *et seq.*) was based upon the offer approved on May 19 by Kern's board and provided for the transfer of Kern's assets and business to "New Kern" and a share-for-share exchange of Kern stock for the new Tenneco preference stock. Each new Tenneco share would pay a fixed quarterly dividend of $1.375 accruing from issuance (980a, at 2, B-1 to B-5) and after July 1, 1969 became convertible into 3.6 shares of Tenneco common stock (*id.*). Kern agreed to have this new stock distributed promptly to its shareholders upon closing in exchange for their shares. The Tenneco stock would be issued without being registered under § 12 of the Act and until registered was not tradable on a national securities exchange (794a; 476a).

The Plan was contingent upon shareholder approval at a special meeting called for July 17 (980a), a favorable tax ruling from the IRS, issuance of necessary permits, licenses and authorizations from appropriate California authorities and numerous material conditions. It provided for a closing between September 30 and December 31, 1967 or at "such other time" as the parties might agree upon (456a at A-16), and contained omnibus clauses under which the parties could change the terms of the agreement and waive compliance with its covenants and obligations (456a at A-23).

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n Petitioner appears to contend for the first time that by proposing a rule to the SEC, Occidental must be deemed to concede that a merger is a "sale" (Petition at 7 n.). All such implications were firmly rejected by the court below: "It is not contended that we should draw any inference from this, and we do not do so." (6a n. 7)

E. *Shareholder Approval*

Kern's management had no concern about shareholder approval of the Plan or any opposition by Occidental (752a). It was constructed so that approval by a simple majority of shares was required with no right to elect appraisal,[o] and the shareholders were voting on a 68% increase in the value of their pre-tender offer holdings. At the special meeting Occidental abstained (877a; 980a at 2).[p] The Plan was adopted by over 99% of all shares voted (651a). A representative of Occidental appeared at the meeting and read a letter explaining why Occidental had decided not to vote for the merger (458a-459a, as corrected, 460a).

F. *Acceleration of the Merger Closing*

Kern and Tenneco moved to accelerate the closing in advance of the dates set forth in the Plan and Proxy Statement. Occidental met with Tenneco to remind it of its prior assurances and requested it to defer the closing but was refused (739a-744a). Tenneco applied to the California Commissioner of Corporations on August 8 for the requisite authorizations, which were granted over Occidental's objections on August 30 (1070a). Kern and Tenneco elected to close on the same day (484a-486a). Concurrently, Kern expressly assigned to New Kern all claims it had under the Act (466a), which included the claims proposed to be made against Occidental under § 16(b) (414a; 570a).

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o Casting the transaction as an exchange of assets avoided the requirement of a ⅔ vote and the right of appraisal which would be applicable to a merger. Cal. Corp. Code §§ 3901, 4107, 4123 (West 1955).

p This had the effect of a "no" vote. *See* Cal. Corp. Code § 3901 (West 1955).

G. *Disposition of the Tenneco Stock*

Occidental did not surrender its Kern shares until December 11, 1967 (247a; 265a; 414a) when, more than six months after Occidental's most recent acquisition of Kern shares, and even longer after the execution of the option, LR Fixed Investment Trust exercised the option. Occidental exchanged its Kern shares for the new Tenneco preference stock; delivered 886,623 optioned shares to the Trust; and was paid $95 per Tenneco share by the Trust as provided in the option, amounting to $84,299,185 (*id.*).

POINT I

Whether the long-term option in this case was a genuine option and therefore not a "sale" under § 16(b) is not a question which merits review.

A. *The case was correctly decided in accordance with accepted law.*

The court below merely adhered to the principle, followed by all courts in applying § 16(b), that no "sale" occurs unless and until the "insider" acquires at least a *right* to sell securities at a price certain. In submitting to a call option, Occidental obtained no right to compel any sale, at any time, or at any price, and thus made no "sale" under § 16(b), and the statute has always been so interpreted.[1]

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1 *Silverman* v. *Landa*, 306 F.2d 422 (CA 2 1962), *affirming* 200 F. Supp. 193 (S.D.N.Y. 1961), held that "a call-option is not a sale of the underlying security;" 306 F.2d at 425, "the insider-*optionor's* position in the underlying security is not fixed when he sells the *option*, but when the option is exercised," *id.* at 424 n.4, since "any change [in ownership] would occur at the pleasure of the optionee." *Id.* at 424; *accord*, *Blau* v. *Ogsbury*, 210 F.2d 426, 427 (CA 2 1954). Precisely the same analysis had been set forth in *Stella* v. *Graham-Paige Motors Corp.*, 232 F.2d 299, 301 (CA 2), *cert. denied*, 352 U. S. 831 (1956); *Falco* v. *Donner Foundation, Inc.*, 208 F.2d 600 (CA 2 1953); *Shaw* v. *Dreyfus*, 172 F.2d 140 (CA 2), *cert. denied*, 337 U. S. 907 (1949); *Park & Tilford* v. *Schulte*, 160 F.2d 984 (CA 2), *cert. denied*, 332 U. S. 761 (1947); and it accords with the opinions issued by the General Counsel for the SEC, 11 Fed. Reg. 10968 (1946); *see* Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 401-02 (1953).

Judge Friendly's opinion carefully distinguished between the instant situation and one where an insider buys a "put" and thus acquires a right to sell the securities at a fixed price (16A). Even that different situation would pose its own range of problems under § 16(b).

Section 16(b) may not be expanded beyond its express limits to "impose its extraordinary liability" on transactions other than purchases and sales of equity securities, thereby changing "an interpretation of the Act unbroken since its passage." *Blau* v. *Lehman, supra,* 368 U.S. at 409, 413; *Reliance Electric Co.* v. *Emerson Electric Co., supra* (slip opinion at 9). The court below correctly declined to expand § 16(b) to include an event which did not constitute, and would not permit, a sale of equity securities within the statutorily defined six-month period.

The same rule was applied here as in *Bershad* v. *McDonough, supra,* upon which petitioner relies. In *Bershad* the court held that "The commercial substance of the transaction rather than its form must be considered." 428 F.2d at 697. The court below undertook to "look through the form of an option to the economic realities" to determine objectively whether "in truth and fact a sale had occurred when the 'option' was granted" (13A-14A). It concluded from undisputed facts that the agreement here was no more than an option and that there was "no basis" for holding otherwise (13A-14A). The two cases turned on different facts, undisputed in each instance.

There was no "alternative holding" in *Bershad* that the grant of an option is a "sale" as a matter of law. Generalized comment there on *other* possible abuses of options created no "holding" in a case where the *only* issue was whether the purportedly optioned stock had in fact been sold. The court expressly removed itself from any controversy about an expansion or narrowing of the statute,

stressing its intention solely to examine the substance of the agreement, 428 F.2d at 697 n.5, just as the court below did. Indeed, had the *Bershad* court held that the grant of an option was a "sale" on a theory that the premium "extracted" profits from the subject stock, as petitioner claims (Petition at 13), this would have been in direct conflict with *Silverman* v. *Landa, supra.*[2] But it had no cause to mention that case because it did not so hold and did not have an option before it.

B. *There is no "factual identity" here with Bershad v. McDonough.*

In *Bershad* v. *McDonough, supra,* a controlling director (and his wife) executed a purported short-term "option" on their recently purchased control block of Cudahy stock. The insider transferred all of the incidents of ownership to the purported "optionee" through, *inter alia,* the grant to the "optionee" of an irrevocable proxy which conveyed full corporate power, the resignations of the insider and his associate from the board, and the placement of the

2 In *Silverman* v. *Landa, supra,* which like the case here involved a long-term option, it was alleged that the insider, by issuing one-year calls and a put, had realized a profit by receipt of the 16.4% premium on the calls sold and an 8.2% premium on the put sold. Plaintiff argued that by the grant of the options, the insider had immediately insulated 20.6% of his risk, roughly the equivalent of immediately buying high and selling low within the range of the "straddle"; and that, as an insider, he could foresee that the price of the stock would remain stable during the term of the options and would keep the entire premium as profit. Both the district and appellate courts rejected the argument and held that § 16(b) applies solely to purchases and sales of equity securities, and that because the option was long-term, the contention that the insider could be held to foresee the price of the stock beyond 6 months went impermissibly beyond the presumption available under § 16(b), 306 F.2d at 425; 200 F. Supp. at 116. The case was urged as a conflict by the petitioner in *Bershad,* and this Court denied review.

"optionee's" five nominees thereon. Plaintiff alleged that the transaction amounted to "more than" an option. *Bershad* v. *McDonough*, 300 F. Supp. 1051, 1054 (N.D. Ill. 1969). The district court so held on his motion for summary judgment, and the Seventh Circuit affirmed, stating:

> The circumstances of the transactions clearly indicate that the stock was effectively transferred, for all practical purposes, long before the exercise of the option. 428 F.2d at 698.

Or, as the court below put it, "the stock had in fact been sold" (15A).

Occidental transferred neither directorships nor control, for, as petitioner concedes, it was a disfavored minority shareholder and had neither. The option was not implicitly or explicitly conditioned upon Occidental's supporting or acquiescing in the merger. Even giving consideration to its impermissible proffers of matter not in the record,[3] peti-

3 Petitioner's assertion that Occidental later gave a proxy to its own counsel, coupled with the statement that the absence of such evidence in the record is attributable to incomplete discovery (Petition at 7n.), is disingenuous. There was obviously no need for discovery on a matter of which petitioner's counsel claims to have personal knowledge. The matter was, moreover, the subject of pretrial deposition at which counsel in all four cases attended and examined (Deposition of Occidental by Walter R. Davis at 41, 79). Since both the district and circuit court decisions in *Bershad* v. *McDonough, supra,* were rendered during proceedings in the district court and were cited in petitioner's briefs there, petitioner's attempt on a petition for review to introduce evidence after a deliberate bypass of an opportunity to make a record on these assertions (including its muteness during all the proceedings before the court below ruled) is clearly impermissible. *Lawn* v. *United States*, 355 U.S. 339, 354 (1958); *McClellan* v. *Carland*, 217 U.S. 268, 282-3 (1910); *Jones* v. *Zurich Gen. Acc. & Liab. Ins. Co.*, 121 F.2d 761, 764 (CA 2 1941); *Bassick Mfg. Co.* v. *Adams Grease Gun Co.*, 54 F.2d 285, 286 (CA 2 1931), *cert. dismissed*, 286 U.S. 567 (1932). Such material should properly be striken from the petition. But it is not necessary here to rely upon procedural impropriety. Assuming, *arguendo*, the substance of the assertions at face value, Occidental's giving a proxy to its own counsel, revocable

tioner's attempt to remold this case to fit *Bershad* fails. There the transactions passed effective ownership of the stock immediately to the alleged "optionee" and served only that function. Here petitioner stresses Occidental's failure to persist in pointless acts of opposition to the merger; the only effective step Occidental could have taken was to outbid Tenneco's richer offer. Its failure to do so, before or after the option, does not convert the option into a sale. Petitioner's view would require the prolongation of opposition only for charade. Even in attempting to avoid that waste Occidental, unlike the *Bershad* defendant, did not transfer any ownership rights to Tenneco.

In *Bershad* the court also found that the payment of 16.7% of the exercise price (14% of the option price) for a 10 week option was a "deterrent" to non-exercise. 428 F.2d at 698. This substantially exceeded the 10.5% of exercise price (9.5% of option price) premium here paid for an option that would run from 6 to 14 months at the will of the optionee. The $10 premium here was based upon the judgment of a qualified third person and permitted no inference that it was a penalty for non-exercise. Once paid, the $10 premium did not reduce the effective exercise price ($95) below current market and thus did not shift the

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as a matter of law under Cal. Corp. Code §§ 2226, 2228 (West 1955), only for the purpose of voting for a merger which it could not realistically prevent, together with whatever personal assurances Occidental's outside counsel is said to have given Tenneco's counsel, obviously gave no right of any kind to Tenneco, and does not compare to the facts in *Bershad*, where the controlling shareholder gave an irrevocable proxy to the "optionee", immediately effective and unlimited as to purpose, transferring effective ownership. Indeed, petitioner, by its repeated failure to raise the issue in either the district court or on appeal, implicitly so admits. Occidental did not vote its shares in favor of the merger, and its vote was not needed. The Second Circuit gave this new assertion the weight it deserved in denying the petition for rehearing, in which it was first raised, without even requesting a response, and had previously indicated that how Occidental might vote was inconsequential (12A n.13).

undertaking into a commitment to exercise. The premium bought time, not equity. The difference between this and the *Bershad* "option" followed *a fortiori* from the fact that the premium, ordinarily always retained by the optionee, would here be returned if there was no merger before July 31, 1968. Petitioner's claims below were flatly contradicted by both the objective economics of the option and its own declaration to shareholders, while the option was outstanding, that it was uncertain whether it would exercise it even if the merger occurred (980a).[4]

If the point need be pressed further, in *Bershad* the "option" itself was *short-term*, expiring in 10 weeks. Here, as in *Silverman* v. *Landa, supra*, the option was long-term, and in the instant case it could be exercised only long-term.

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4. While conceding that the effective exercise price of the option was not below market and that the premium was based on the Donaldson opinion, petitioner for the first time in its petition for rehearing asserted that the evidence on the reasonableness of the premium was hearsay. Petitioner did not dispute that the advice had been given, nor did it assert that it had any contrary evidence but apparently sought remand so that it might procure an "expert" who might second-guess the Donaldson opinion four years after the fact. Petitioner's failure to raise technical objections to this evidence in the district court vitiated any such objections, *Auto Drive-Away Co. of Hialeah, Inc.* v. *ICC*, 360 F.2d 446, 448-449 (CA 5 1966); *Klingman* v. *Nat'l Ind. Co.*, 317 F.2d 850, 854 (CA 7 1963); *Mitchell v. Dooley Bros. Inc.*, 286 F.2d 40 (CA 1 1960), *cert. denied*, 366 U.S. 911 (1961), *a fortiori* so in view of its continued silence in the appellate court (17A). And, of course, the premium accords with the standards set forth in public sources. See D. VAUGHN, SURVEY OF INVESTMENTS 41 (1967) ("the cost of a six month contract is approximately 12 percent of the market price of the stock"); W. J. EITEMAN, C. A. DICE & D. K. EITEMAN, THE STOCK MARKET 316-17 (4th ed. 1966) ("premiums paid by buyers of a six-month calls amount to about 14 percent of the value of the stock. The percentage premium on low-price stocks would probably run somewhat above this, and the percentage premium on high-priced stocks would probably run slightly below"); SEC, REPORT ON PUT AND CALL OPTIONS 84, 85 (1961) (Six-month calls were approximately 12 percent of the value of the stock; price of one-year calls approximately 164.8% of the price of six-month calls.) The call agreement in the present case was from more than 6, to 14 months.

The claimant might properly assert in *Bershad* that exercise was "inevitable", for the insider could be held to know that the stock prices in the short-term would ensure exercise. But § 16(b) does not permit a presumption that Occidental could foresee that, when the option first became exercisable *more than six months later*, the price of the stock would then favor or even permit exercise, or would otherwise render its grant profitable. *Silverman* v. *Landa, supra,* 306 F.2d at 425; *see Blau* v. *Max Factor & Co.,* 342 F.2d 304, 308 (CA 9), *cert. denied,* 382 U. S. 892 (1965); *Roberts* v. *Eaton,* 212 F.2d 82, 85 (CA 2), *cert. denied,* 348 U. S. 827 (1954); *Steinberg* v. *Sharpe,* 95 F. Supp. 32, 34 (S.D.N.Y.), *aff'd* 190 F.2d 82 (CA 2 1951); *cf. Booth* v. *Varian Associates,* 334 F.2d 1, 4 (CA 1 1964), *cert. denied,* 379 U. S. 961 (1965). Moreover, the option here was on shares of Tenneco, not Kern,[5] and the possibility of exercise of, or profit or loss on, the option turned upon the long-term market price of nonexistent securities of a company in which Occidental was not an insider and could not be presumed to be under § 16(b).

The facts of this case and *Bershad* are wholly different, and both cases turned on their facts. This Court does not sit to review the application of accepted rules in particular cases.[6] As Justice Harlan stated:

> [D]ifferences between the Courts of Appeal in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.[7]

5. Section 16(b) in terms requires a purchase and sale of the securities of the same issuer.

6. *United States* v. *Johnston,* 268 U. S. 220, 227 (1925); *NLRB* v. *Waterman Steamship Corp.,* 309 U. S. 206, 208 (1940); *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U. S. 175, 178 (1938).

7. Harlan, *Manning the Dikes,* 13 RECORD OF N.Y.C.B.A., 541, 552 (1958).

C. *The "escape hatch" does not exist.*

The claim that the decision below creates a new means to "evade" § 16(b) begs the question, for it assumes that the mechanics of § 16(b) are triggered by transactions other than purchases and sales. See *Reliance Electric Co.* v. *Emerson Electric Co., supra* (slip opinion at 5). Sham "options" will be treated as sales (13A-14A) and create no escape.

In the case of a long-term option, particularly one exercisable only long term, the alleged "escape" is from a liability that cannot exist under § 16(b)—even if it were someday expanded by Congress to cover the grant of an option. Petitioner's obscure assertion that an insider can buy stock and "reap a speculative short-swing profit upon it" by submitting to an option (Petition at 15) necessarily assumes that the insider can foresee that the premium will exceed all future changes in market price adverse to the insider's position in the option during its term. If the option is long-term then the assumption fails, because § 16(b) neither grants nor permits a presumption that an insider can effectively predict market prices more than six months ahead. Rather than an "escape," the option constitutes a prolonged encumbrance on his security position.

The option involved in this case would have no appeal for one seeking a "sure-thing profit." While Tenneco was even less engaged than the usual optionee (it could reclaim the premium merely by delaying the merger), Occidental was required to bear all downside risks for more than 6 and prospectively 14 months and was prevented from realizing interim gains. Occidental's retention of the Kern shares, inflated in price by merger prospects, carried the unusual risk of a 30% tumble to their pre-offer price if circumstances made the merger undesirable—even omitting consideration of a general market decline. If a merger did occur within the 14-month period, Occidental would retain only the premium, but whether it would profit or lose by

exercise or nonexercise depended wholly upon the long-term state of the market and the fortunes of Tenneco.[8] The Court below took account of the grantor's risks (14A, 16A), and if it made any error, it was only in assuming that the Tenneco preference stock could drop merely to $75 per share (14A). In fact, when the "bottom fell out of the market," as the court envisioned it might, (*id.*), that stock traded as low as 66½.[9]

POINT II

Whether a "merger" in a particular case should give rise to §16(b) liability is not a question which warrants review.

A. *The case was correctly decided in accordance with accepted law.*

Although petitioner would urge absolute liability for Occidental solely because petitioner's predecessor and its parent were able to rush through a merger within six months, it apparently concedes that the court below applied the correct rule of law: Whether certain "unorthodox"

8. The petition inaccurately asserts that "nonexercise . . . would have left Occidental with a nearly $9 million profit by reason of the option price alone which profit should certainly be subject to recovery." (Petition at 16) If a merger did not take place or was delayed, Occidental in fact would not be left with $9 million, because it would forfeit the premium. Even if the merger occurred, Occidental would have not merely the premium, but also the continuing risk of holding the very shares petitioner claims to have been sold previously. In addition, petitioner's claim is that the premium paid should be recoverable regardless of whether there was a *sale* of equity securities, but the statute explicitly otherwise requires, *Silverman* v. *Landa, supra;* and this very different question is not even properly before the Court as a "Question Presented."

9. May 26, 1970. 211 COMM. & FIN. CHRONICLE, June 1, 1970, at 16. Petitioner seeks remand to develop evidence on "knowledge, intent and motivation" (Petition at 15 n.), issues which this Court and all others have expressly declared to be irrelevant under § 16(b). *Reliance Electric Co.* v. *Emerson Electric Co.,* (Slip Opinion at 7 & n.4); see, *e.g., Blau* v. *Lamb,* 363 F.2d 507, 522 (CA 2 1966), *cert. denied,* 352 U. S. 1002 (1967).

transactions (mergers, conversions, and the like) are to be deemed "purchases" or "sales" under § 16(b) turns on whether the transactions allowed "an insider to use inside information unfairly," *Blau* v. *Lamb, supra,* 363 F.2d at 516.[10] That test has repeatedly been applied by the several courts of appeals, and in each instance this Court has denied review.[11] The application of that rule to a particular merger or other exchange is not a question which merits the Court's consideration.

Each such situation has turned on its own facts, and here there was no chance for abuse of confidential information in the merger exchange. Occidental had no prior relationship to the issuer; before Tenneco made any offer Occidental was already committed; Occidental's purchases were made in the spotlight of a publicized tender offer available to all shareholders; the exchange "in which all shareholders were entitled, indeed were forced to participate" (10A), was pro rata and was itself a maneuver employed to displace Occidental and controlled by its adversaries. The court below might well have refused to deem the Kern-Tenneco merger a "sale" solely on the ground that under § 16(b) a "purchase" or "sale" should constitute an event occurring "by one's own act." See *Ferraiolo* v. *Newman, supra,* 259 F.2d at 344-45 n.2, n.3; *Shaw* v. *Dreyfus, supra,* 172 F.2d at 142. Instead the court tested the transaction by the more rigorous "possbility of abuse test" and found Occidental not to

10 Other types of abuses are not a concern of § 16(b) and come within the purview of other laws, federal and state. *Id.*, at 521, 522 n.22; *Blau* v. *Ogsbury, supra,* 210 F.2d at 427; *Falco* v. *Donner Foundation, Inc., supra,* 208 F.2d at 604; *see Roberts* v. *Eaton, supra,* 212 F.2d at 85; *Smolowe* v. *Delendo Corp.,* 136 F.2d 231, 235 (CA 2), *cert. denied,* 320 U.S. 751 (1943).

11 See *e.g., Newmark* v. *RKO General, Inc.,* 425 F.2d 348 (CA 2), *cert. denied,* 400 U.S. 854 (1970); *Blau* v. *Lamb, supra; Petteys* v. *Butler,* 367 F.2d 528 (CA 8 1966), *cert. denied,* 385 U.S. 1006 (1967); *Blau* v. *Max Factor & Co., supra; Ferraiolo* v. *Newman,* 259 F.2d 342 (CA6 1958), *cert. denied,* 359 U.S. 927 (1959).

be liable (10A-12A). The result here had been anticipated and approved by critical commentators.[12]

The assertion that this is the first case in which the transformation of shares in a merger has been held not to constitute a "sale" has no consequence. *Newmark* v. *RKO General, Inc., supra,* also decided by the court below, was the only instance in which such a transformation had been deemed a "sale", and then only under circumstances which, as the court below carefully noted, had no factual counterparts here (11A). The *Newmark* case explicitly contemplated that some mergers might be "sales" and others not, 425 F.2d at 351, and the circuit judges who sat on the *Newmark* panel concurred in the denial of rehearing here.

Petitioner would be more accurate if it stated that there has never been a case decided under § 16(b) where an "unorthodox" transaction has been deemed to be a "purchase" *or* a "sale" if the defendant had no realistic economic alternative to, or had no control over, the claimed § 16(b) violation.[13] Here the economic compulsion was more acute than in the cases cited. The only escape for Occidental from the alleged "sale" was to outbid Tenneco's richer offer,

12 Comment, *Securities Regulations—Exchange of Stock Pursuant to Merger is Sale by Insider under § 16(b) of the Securities Exchange Act of 1934,* 84 HARV. L. REV. 1012, 1021-22 (1971); Note, *Stock Exchanges Pursuant to Corporate Consolidation: A § 16(b) "Purchase or Sale"?,* 117 U. PA. L. REV. 1034, 1056-57 (1969).

13 See *Park & Tilford, Inc.* v. *Schulte, supra,* 160 F.2d at 987-8; *Ferraiolo* v. *Newman, supra,* 259 F.2d at 346; *Blau* v. *Lamb, supra,* 363 F.2d at 518-20 n.15, n.16; *Petteys* v. *Butler, supra,* 367 F.2d at 530; *Heli-Coil Corp.* v. *Webster,* 352 F.2d 156 (CA 3 1965); (no call for redemption); *Gold* v. *Scurlock,* 324 F. Supp. 1211 (E.D. Va. 1971), *appeal pending* (principal stockholders and directors of merging corporation); *Lynam* v. *Livingston,* 276 F. Supp. 104, 106 (D. Del. 1967); *Fistel* v. *Christman,* 135 F. Supp. 830 (S.D.N.Y. 1955) (controlling shareholder); *Blau* v. *Hodgkinson,* 100 F. Supp. 361 (S.D.N.Y. 1951) (option not to take stock on "purchase" side); see also *Booth* v. *Varian Associates, supra,* 334 F.2d at 5; *Roberts* v. *Eaton, supra,* 212 F.2d at 83-84; *Blau* v. *Oppenheim,* 250 F. Supp. 881, 885 (S.D.N.Y. 1966); *Perlman* v. *Timberlake,* 172 F. Supp. 246, 256 (S.D.N.Y. 1959); *cf. Alloys Unlimited, Inc.* v. *Gilbert,* 319 F. Supp. 617, 619 (S.D.N.Y. 1970).

> and thereafter sold their holdings to persons making the counter offers.[16]

Petitioner also omits to state that Congress received testimony strongly urging that it was through such tender offers that inefficient management could be challenged and that shareholders realize gains on investments that had remained greatly undervalued.[17] The committee reports weighed the testimony concerning tender offers and concluded that federal policy should avoid the creation of special advantages for either bidder or target:

> The committee has taken extreme care to avoid tipping the delicate balance of regulation either in favor of management or in favor of the person making the takeover bid.[18]

In passing the Williams Act amendments[19] subsequent to the events in this case, Congress resolved the problems surrounding cash tender offers by a balanced treatment of disclosure and regulation. This is inconsistent with petitioner's approach, which would penalize actual and chill potential bidders by automatically requiring them to return their shares at cost to the victor, in the form of a windfall

16 *Hearings on H.R. 14475 & S. 510 Before the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., at 22 (1968) (hereinafter "*House Hearings*"). Even the quotation upon which petitioner relies bears no relationship to the use of inside information. In addition, while we view the matter as of little importance, petitioner's quotation from an article appearing in *Fortune* is similarly out of context. The sentence quoted lies at the end of a paragraph expressing the view of the author that the Occidental-Kern contest was an instance where it was possible for "everyone", including the shareholders, ultimately "to come out ahead." Rukeyser, *Getting Tough with Tenders*, FORTUNE, Aug. 1967 at 109.

17 S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

18 *Id.* at 3. Almost identical language is set forth in H. R. REP. No. 1711, 90th Cong., 2d Sess. 4 (1968).

19 §§ 13(d),(e); 14(d),(e),(f) of the Act; 15 U.S.C. §§ 78m (d),(e); 78n(d),(e),(f).

recovery, and thereby finance their own defeat. Since the conventional rules of § 16(b) did not call for such a result here, the court below did not have to reach this issue, but noted the necessary effect of petitioner's theory:

> Indeed, if we considered the question here under discussion to be closer than we do, we would be seriously concerned over the policy implications of ruling in appellees' favor. . . . This would discourage the making of such offers, which often operate to the great benefit of stockholders of the target corporation, as appears to have been the case here. (12A, 13A)

Congress enacted § 16(b) for the wholly different and particularly insidious problem of "in and out" trading on inside information. Petitioner's position would, at the least, require defeated bidders to engage in wasteful opposition solely to delay such mergers, and it merits no consideration.[20]

C. *There is no question of sufficient recurrence or breadth to warrant review.*

This case reflects conditions and responses that prevailed during the merger activity of the mid-1960's. Even then the authors of the work which the then Chairman of the SEC referred to as the most extensive study of takeover

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20 Congress was aware of the existence of § 16(b) in considering the "delicate balance." Prompted by the testimony of the then Chairman of the SEC quoted by petitioner (later clarified) and some newspaper articles, Rep. Moss asked whether any profits made by a defeated bidder were recoverable. The Chairman replied that § 10 covered actual attempts to manipulate but § 16(b) could not be relied upon in such situations since: (1) the offeror may not be a ten percent owner "at the time of" the acquisition; (2) the offeror's holdings may never reach ten percent; *House Hearings* 30; (3) a merger may not be considered to be a "sale"; (4) it may not be proper to match the purchase of securities acquired with those of a different company resulting from the merger. *House Hearings* 75-76.

bids,[21] referred to a "defensive merger" as an "if all else fails" event.[22] Another study noted:

> Realistically this is not a defense tactic, but rather a form of orderly retreat, and one would expect that unless such a merger was being actively considered prior to the tender offer, it would be viewed by incumbent management only as a last, albeit very effective, resort.[23]

More sophisticated "defensive" techniques have since come into prominence,[24] and, with an apparent decline in adversary take-over bids, there seems little reason to expect any significant number of managements turning to the "last resort" of the "defensive merger". Fewer contests yet will involve the rare instance presented here, where a merger was procured and rushed through so hastily as to create a question under § 16(b).[25] Section 16(b) may apply in some instances where defensive mergers occur and not in others, but this presents no broad recurring question which merits review by this Court, given the alertness of the lower courts and the want of a conflict.

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21 *House Hearings* 22.

22 Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 135, 142 (1967), reprinted in *Hearings on S. 510 Before the Subcommittee on Securities, Comm. on Banking and Currency*, 90th Cong. 1st Sess. (1967), App. 2.

23 Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW 115, 132 (1967).

24 Such as changes in capital and voting structures; various means of increasing the number of target shares, including acquisitions by the target; dividend and accounting changes; antitrust litigation; and so forth. *See e.g.*, O'Hanlon, *Goodrich's Four Ply Defense*, FORTUNE, July 1969 at 10. Note, *Defensive Tactics Employed by Incumbent Management in Contesting Tender Offers*, 21 STAN. L. REV. 1104, 1111-27 (1969).

25 Indeed the petitioner can cite only one other case in the 37 year history of the Act involving the problem of a defensive merger under § 16(b), the opinion in which has been withdrawn, and even that case differs significantly from this one. In *American Standard, Inc.* v. *Crane Co.*, 1971 CCH Fed. Sec. L. Rep. ¶ 93,237 (S.D.N.Y.

D. *No judicial "exemption" from §16(b) was granted.*

Contrary to petitioner's claim, the ruling below granted no ad hoc exemption from § 16(b). The transaction here was not within the language or intendment of the Act. Insofar as petitioner's claim raises the question whether courts in unusual situations may construe the terms "purchase" and "sale" under the accepted test, it would appear to have been disposed of by this Court's approval of the process by which "courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse." *Reliance Electric Co.* v. *Emerson Electric Co., supra* (slip opinion at 7 n.4) Petitioner's position has been firmly rejected by the courts of appeals, review has been denied in each instance,[26] and it clearly deserves no further consideration.

Oct. 12, 1971) (withdrawn), the defendant's accumulation of 10 percent of the issuer's shares was accomplished in private market purchases and its tender offer 4 months later was made after it was explicitly informed that "agreement had been reached" on a merger between the target company and another bidder. All of Occidental's purchases were pursuant to a publicized tender offer and extension thereof made before Kern had any offer of merger. The differences need not compel a finding of liability in *American Standard;* it is sufficient to note that they must be considered.

26 See *Newmark* v. *RKO General, Inc., supra,* 425 F.2d at 351; *Blau* v. *Max Factor & Co., supra,* 342 F.2d at 307 n.5; *Petteys* v. *Butler, supra,* 367 F.2d at 536; *Blau* v. *Lamb, supra,* 363 F.2d at 519. Petitioner stresses Mr. Justice Blackmun's dissent in *Petteys* v. *Butler, supra,* which would appear to have rested primarily on adherence to the principle of *stare decisis* within his own circuit at that time. 367 F.2d at 538-39.

CONCLUSION

The decision below was correct and is consistent with the decisions of this Court and the courts of appeals. There is no conflict; each case depends upon analysis of the impact of its particular facts. The court below has been alive to the need to penalize and prevent short-term use of "inside" information, and its decision is in accord with the language and purpose of the statute. There was thus no basis upon which petitioner could extract windfall recovery from Occidental by reason of acts for which it was directly and indirectly responsible. The petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1059

KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1971

No. 71-1059

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OCCIDENTAL PETROLEUM CORPORATION,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Kern County Land Company ("New Kern") respectfully submits this brief in reply to the brief of respondent Occidental Petroleum Corporation ("Occidental") in opposition to the grant of a writ of certiorari.

The Option Issue

Occidental's answering brief begs the question presented with respect to the Occidental option by proceeding on the assumption that options are "transactions other than purchases and sales" (Br., p. 20). In fact, the court of appeals in its opinion below expressly recognized that Section 3(a)(14) of the Securities Exchange Act defines "sale" to include any "contract to sell" and that an option is "a con-

tract to sell in a dictionary sense." Nevertheless, the court held it to be the rule "in this circuit" that the sale of an option "is not a sale for purposes of § 16(b); this occurs only when [and if] the optionee exercises the option" (Opinion Below, 13A).

In ignoring the statutory definition of the term "sale," the court did not discuss the possibility of speculative abuse inherent in an insider's sale of an option. In a conflicting decision, the Court of Appeals for the Seventh Circuit found Section 16(b) liability on virtually identical facts, expressly holding that "[t]he insider's sale of options in his stock is well adapted to speculation and abuse of inside information, *whether or not the option is subsequently exercised*" and that "[s]ale of such purchase rights provides an easy vehicle for the use of inside information in extracting profits from the stock itself" (*Bershad* v. *McDonough*, 428 F.2d 693, 698 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971). (emphasis added)*

Occidental's argument in answer to the foregoing is that the sale of an option does not confer a "sure-thing profit" because unanticipated events, such as the bottom falling out of the market, might in retrospect make the sale of the option unprofitable (Br., p. 20). The notion that Section 16(b) liability may be imposed only if there is 100% assurance of profit flies in the face of the express statutory

* While conceding the possibility that some options may be "in truth and fact a sale" and thus within Section 16(b), Occidental disputes that this was such an option. In so doing, Occidental relies either upon its own version of the facts (as in the case of the economic reasonableness of the option price) or in many instances upon facts dehors the record (as in its explanation of the proxy which it gave its attorney). For reasons discussed in the Petition for Certiorari (pp. 13-15), we respectfully submit that if the question of whether an option is a "sale" for Section 16(b) purposes must turn on the factual question of whether or not it is a disguised sale summary judgment for defendant, as the court of appeals directed, was erroneous.

purpose of "preventing the unfair use of information" obtained by insiders. An insider is conclusively presumed to have access to inside information not available to other stockholders. In entering into transactions in his company's securities, including the sale of an option, his access to inside information gives him an *opportunity* to profit not enjoyed by other stockholders. The possibility that the insider's speculation may on rare occasion boomerang and prove unprofitable is no reason for permitting him to keep the fruits of his speculation in the overwhelming number of instances where, as is to be expected, it proves to be profitable.

So here, despite Occidental's contention that the option did not give it a "sure-thing profit," less than one month after becoming a 20% beneficial owner it did receive over $8,000,000 cash in hand in return for the option itself, and the likelihood of the option being exercised, as it was at a profit to Occidental of over $17 million, far outweighed the possibility of non-exercise or of any loss to Occidental, if indeed it existed. Certainly, Occidental's President, Dr. Hammer, does not appear to have had the possibility of any loss in mind, when shortly after entering into the option agreement he boasted to Fortune Magazine of looking forward to a profit of over $17 million, which he aptly observed "isn't bad for two weeks' work."

The Exchange Issue

Occidental's answering brief attempts to minimize the importance of the question of whether or not the exchange of Old Kern shares for Tenneco preference stock constitutes a "sale" of Occidental's Old Kern shares by arguing this case "reflects conditions and responses that prevailed during the merger activity of the mid-1960's" (Br., p. 27). While it may be that market conditions in recent months

have led to a decline in the number of takeover attempts that were previously reported, there is no reason to believe that such activity will not increase as the market improves and that the exchange of shares of one company for those of another will not continue to occur with significant frequency.

Moreover, as pointed out in the Petition for Certiorari (p. 19, *et seq.*), the decision below is not confined, as Occidental's brief maintains, to exchanges of stock following upon an unsuccessful tender offer, but suggests that *ad hoc* exemptions from 16(b) may be granted whenever the court feels that a Section 16(b) recovery would be "repugnant" to its "sense of equity" (Opinion Below, 13A), in spite of what this Court has recently described as the "mechanical quality" of the statute. *Emerson Electric Co.* v. *Reliance Electric Co.*, U.S. (1972) (Slip Op., p. 7).

Indeed, Occidental's answering brief concedes that the test of Section 16(b) liability applied by the court of appeals here was one which "requires a careful examination of the facts . . . on a case-by-case basis" and that "[a] decision on the facts of this case cannot resolve future merger cases, . . ." (Br., p. 22). Such an *ad hoc* approach represents a drastic repudiation of the uniform line of authority* which has held, until now, that the courts will not concern themselves with the "details of transactions" but only with the question of whether or not a particular *type* of transaction "objectivity defined" might serve as a vehicle for speculative abuse. *Emerson Electric Co.* v. *Reliance Electric Co.*, *supra*, (Slip Op. p. 7n). Thus, for example, in the leading case of *Blau* v. *Lamb* (*supra* fn.), the court objectively defined the question to be decided as "whether a conversion of preferred stock into common constitutes a Section 16(b) 'sale'" and expressly rejected as irrelevant con-

* E.g., *Blau* v. *Lamb*, 363 F.2d 507 (2d Cir. 1966) *cert. denied*, 385 U.S. 1002 (1967); *Newmark* v. *RKO General, Inc.*, 425 F.2d 348 (2d Cir.) *cert. denied*, 400 U.S. 854 (1970).

sideration of the control position of the defendant insider. 363 F.2d 517, 520-21.

The new approach of the court of appeals, which focuses upon the particularized facts rather than the type of transaction involved, necessarily undermines the "mechanical quality" of the statute, which Congress intended, and encourages defendants not only to enter into short-swing transactions but also when sued, to litigate Section 16(b) actions in the hope that they too will be the beneficiaries of an *ad hoc* exemption granted upon a "case-by-case basis."

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, it is respectfully submitted that a writ of certiorari be granted and the judgment of the Court of Appeals for the Second Circuit reversed.

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IN THE

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OCTOBER TERM, 1972

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KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER KERN COUNTY LAND COMPANY

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Stella v. *Graham-Paige Motors Corp.*, 232 F.2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956) 13

Vine v. *Beneficial Finance Co., Inc.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967) 28

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1059

KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER KERN COUNTY LAND COMPANY

Opinions Below

The decision of the court of appeals under review is reported at 450 F.2d 157 (1A)*. It reversed the decision of the district court reported at 323 F.Supp. 570 granting summary judgment in favor of petitioner in the amount of $23,511,337.94 (1C).

* Citations with the suffix "A", "B" or "C" are to pages of the Appendix to the Petition for Writ of Certiorari. Citations with the suffix "a" are to pages of the printed Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 13, 1971 (1B). A petition for rehearing or, in the alternative, rehearing in banc was filed on October 27, 1971. Such petition was denied on November 19, 1971 with Judge Hays noting his dissent from the denial of rehearing in banc (3B, 4B). The petition for a writ of certiorari was filed on February 17, 1972 and was granted on April 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 3(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a), provides in pertinent part:

> "When used in this chapter, unless the context otherwise requires—
>
> • • •
>
> "14. The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), provides in pertinent part:

> "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner,* director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other

* The term "such beneficial owner" relates back to Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(a), which provides for the reporting of beneficial ownership of equity securities and changes in such ownership by, among others, "[e]very person who is directly or indirectly the beneficial owner of more than 10 percentum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12" of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*. The securities involved in this action were so registered.

than an exempted security) within any period of less than six months * * * shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * * This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Questions Presented

1. Whether a statutory insider's sale of an option with respect to more than 20% of a class of equity securities, within a month after it had purchased such securities, is a "sale" of such securities under Section 16(b) of the Securities Exchange Act of 1934?

2. Whether a statutory insider's exchange of more than 20% of a class of equity securities for securities of an entirely different company, less than six months after it had purchased such securities in a cash tender offer, is a "sale" of such securities under Section 16(b) of the Securities Exchange Act of 1934?

Statement of the Case

This action was brought by petitioner Kern County Land Company ("New Kern") pursuant to the provisions of Section 16(b) of the Securities Exchange Act of 1934 to recover short-swing profits of some $18 million made by respondent Occidental Petroleum Corporation ("Occident-

al"), in the purchase and disposition of a more than 20% interest in the common stock of petitioner's predecessor-assignor of the same name, the former Kern County Land Company ("Old Kern").

Petitioner submits that the material facts requiring imposition of Section 16(b) liability upon Occidental are undisputed.

Occidental's Purchase of Old Kern Shares

On Monday, May 8, 1967, Occidental publicly announced that it was making a cash tender offer to purchase up to 500,000 shares (an amount in excess of 10% of those outstanding) of Old Kern common stock at $83.50 per share plus a $1.50 commission to brokers who procured tenders. By May 10, 1967, two days after Occidental's tender offer was first announced, more than 500,000 shares of Old Kern stock had been tendered to Occidental (118a-1, 380a), and on May 11, 1967 Occidental announced an amendment of its tender offer to cover an additional 500,000 shares (383a). Prior to the close of its offer on June 8, 1967, Occidental purchased a total of 885,649 shares as a result thereof (20.5% of those outstanding) at a total cost of $75,280,165 (75a-76a, 21C).

The Tenneco-Old Kern Agreement

Following Occidental's announcement of its tender offer, Old Kern's management entered into discussions with various companies, including Tenneco Inc. ("Tenneco") and Occidental itself, with a view to possible corporate combination (263a). On May 19, 1967, Old Kern's Board of Directors approved an offer by Tenneco under which Tenneco was to acquire Old Kern's business and assets in exchange for shares of a new Tenneco Convertible Preference Stock to be distributed to Old Kern shareholders in

liquidation, in exchange for their Old Kern common stock. Old Kern's acceptance of the Tenneco offer was announced the same day (259a-267a).

Occidental appraised the Tenneco Convertible Preference Stock at $105 per share and its President, Dr. Armand Hammer, issued a statement dated the same day, Friday, May 19, 1967, to Occidental stockholders announcing an indicated "profit to your company of about $18 million . . ." as a result of the Tenneco offer (328a, pp. 6-7).

The Occidental Option Agreement

Nevertheless, on the following Monday, May 22, 1967, Occidental made written demand upon Old Kern for an inspection of its list of shareholders, books of account, minutes of stockholder, board of directors and executive committee meetings, together with all records, books and documents referred to therein (286a). On Thursday, May 25, 1967, Occidental filed a petition in the California Superior Court demanding inspection of such documents (465a).

Prior to the return date of its petition, Occidental, describing itself as "the principal stockholder of Kern County Land Company", made a further written demand upon Old Kern calling for inspection of numerous additional books and records, as well as "the election of at least two (2) persons to be designated by Occidental to the board of directors" (289a). This demand was followed by the filing of a second court petition on May 31, 1967, alleging Occidental's status as owner of more than 10% of Old Kern's common stock and asserting that it needed such inspection in order to determine whether or not "to oppose" the Tenneco-Old Kern transaction, citing the time needed "to prepare proxy soliciting material" and to "file preliminary copies of such proxy soliciting material with the Securities and Exchange Commission" (474a, 477a). Prior to any court ruling on

Occidental's petitions, Old Kern voluntarily permitted an Occidental team of up to five lawyers and accountants to inspect such non-public documents as Old Kern's general ledger, consolidating financial statements, consolidating journal entries, details of cash receipts from oil operations, supporting trial balances and other records over a six-day period (268a).

In the interim, on May 23, 1967 (the very day after Occidental had first demanded inspection of Old Kern's records), Occidental's Executive Vice President, Mr. Walter R. Davis, requested a meeting with Mr. Gardiner Symonds, then Chairman of the Board and chief executive officer of Tenneco (252a). Such meeting could not be arranged until May 30, 1967, the Memorial Day holiday, at Mr. Symonds' home in Houston, Texas. Then, according to Mr. Davis' deposition testimony:

> "I went in and after just miscellaneous conversation, I told Mr. Symonds that I felt like Occidental did not want to get into a proxy fight with Tenneco or a fight in the Kern County situation and that I had been authorized by Dr. Hammer to discuss with him the possible purchase of our stock * * *" (45a).

Nevertheless, as noted above, on the very next day, May 31, 1967, Occidental filed its second court petition in San Francisco, making reference to the preparation of proxy soliciting material.

The initial meeting between Mr. Davis and Mr. Symonds was followed by meetings between them in New York on June 1 and June 2, 1967, at which the parties were also represented by counsel. At these meetings, Occidental's attorneys proposed, instead of the outright sale originally proposed by Occidental, that the parties enter into an option agreement exercisable after December 9, 1967 (six months

plus one day after the closing date of Occidental's tender offer), giving Tenneco an option to purchase at $105 per share 886,623 shares of Tenneco Preference Stock which Occidental would receive in exchange for its Old Kern common stock upon consummation of the Tenneco-Old Kern agreement (253a). The cost of this option was to be $10 per share, or a total of $8,866,230 to be credited against the aggregate purchase price of $93,095,415 upon exercise of the option. This was agreed to by Tenneco and a formal written option agreement between Occidental and Tenneco Corporation (a subsidiary of Tenneco Inc.) was prepared. It provided that, if the closing of the Tenneco-Old Kern agreement did occur, Occidental would retain the $8,866,230 which it had received even though Tenneco failed to exercise its option (129a, *et seq.*).

On Friday, June 2, 1967, the Option Agreement was executed on behalf of Tenneco and Occidental. On the same day, Occidental publicly announced that it would not oppose Tenneco's proposed acquisition of Old Kern (330a-331a), and gave its attorney, Mr. Albert J. Brown, of the San Francisco firm of Pillsbury, Madison & Sutro, a proxy to vote its Old Kern shares specifically authorizing him "to vote in favor of the proposed sale of the assets of Kern County Land Company to a wholly-owned subsidiary of Tenneco Inc." Mr. Brown in turn assured Tenneco's counsel that he would vote Occidental's Old Kern shares in favor of the Tenneco acquisition.* Occidental also thereafter voluntarily dismissed its pending legal actions for production

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* The foregoing proxy and Mr. Brown's assurances were not part of the record before the district court and the court of appeals, but were brought to the court of appeals' attention by the petition for rehearing (506a, *et seq.*) which pointed out that discovery below had not been completed and that there were additional facts concerning the option which could be elicited at a trial. Petitioner contended that, given the existence of such facts, the court should not have granted summary judgment in favor of Occidental on the ground, *inter alia*, that the option was not "in truth and fact a sale."

of Old Kern books and records (318a, 327a), and abandoned its demand for representation on Old Kern's Board.

Upon the execution of the Option Agreement on June 2, 1967, Tenneco paid Occidental $886,623 by check and a week later transmitted the rest of the total $8,866,230 option price (85a).

Subsequently, Mr. Brown asked to be relieved of his undertaking to vote the proxy Occidental had given him in favor of the Tenneco transaction. This was consented to by Tenneco only when it became apparent that Occidental's vote was not needed to provide the 50% affirmative vote necessary to approve Tenneco's acquisition of Old Kern.* Instead, it was agreed that Occidental would submit a letter, to be read at the Old Kern stockholders' meeting, which stated that Occidental was not voting because "we would rather have worked out our own transaction with KCL [Old Kern]" but that it did not "view the transaction as unfair or inequitable to a KCL shareholder", and that if "the transaction were one in which we had a right of appraisal, we would not seek such right but would vote in favor of the sale of assets" (127a).

Occidental's Efforts to Secure an SEC Rule

On the Monday following execution of the Option Agreement, June 5, 1967, Occidental's counsel sent Tenneco's counsel a copy of a proposed Rule 16(b)-11 which Occidental had asked the Securities and Exchange Commission to adopt (102a, 180a). This proposed rule would have exempted from the provisions of Section 16(b) the "disposition . . . pursuant to a merger or consolidation" of securities by a beneficial owner of more than 10%, provided the beneficial owner (a) had acquired them in a public tender

* This matter was also brought to the attention of the court of appeals by the petition for rehearing (510a-511a).

offer and (b) continued to hold the security acquired by him in the merger more than six months after his purchase of the original security (180a). The next day, June 6, 1967, Occidental's counsel wrote to Tenneco's counsel concerning the proposed rule (239a-240a). Counsel's letter referred to a telephone conversation had the previous day with Mr. Philip Loomis, then General Counsel of the Securities and Exchange Commission, "to discuss the proposed rule that the SEC was considering to give Occidental some relief in the situation in which it found itself". The letter stated:

> "As we had proposed the rule and, as we had understood from Myer Feldman [Occidental's Washington counsel], we were going to be granted an exemption at both ends."*

The letter further noted that if a rule were not adopted, the "only alternative" Occidental would have would be "to commence every kind of litigation it could reasonably bring and attempt to stall the consummation of the Tenneco-Kern transaction for six months", and that "[o]bviously this would be disadvantageous to the other Kern stockholders".**

On July 12, 1967, the Commission advised Occidental's counsel that "the Commission considers it undesirable to

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* The phrase "both ends" reflects Occidental's then concern about the possibility that its acquisition of Tenneco Preference Stock coupled with its disposition of such stock upon exercise of the Option Agreement might give rise to a separate Section 16(b) liability. This potential liability, which did not ultimately arise, is discussed in footnote 6 of the opinion below (5A).

** A whole series of purported stockholder suits attempting to block the Tenneco-Old Kern transaction did subsequently materialize. These are reviewed in detail in the opinion of the District Court for the Northern District of Texas in *600 California Corp.* v. *Harjean Co.*, 284 F.Supp. 843 (N.D. Tex. 1968), in which the court concluded that "somebody with a lot more at stake and a much stronger motive for delaying the closing than these named plaintiffs was furnishing an almost unlimited expense account to finance this weird pattern of delaying actions" (284 F. Supp. at 861).

publish for comment any proposed rule in this area at the present time" (191a). Occidental persisted in its efforts to obtain a rule from the Commission and on August 29, 1967 the full Commission heard argument in support of a modified and more restricted version of Occidental's proposed rule (104a, 199a), and later considered a 30-page letter from Occidental's counsel in further support of its proposed rule (202a). Nevertheless, the Commission refused to modify its earlier decision not to take action and no such rule was ever adopted.

The Closing of the Tenneco-Old Kern Transaction

Tenneco's acquisition of the business and assets of Old Kern was embodied in a formal Agreement and Plan of Reorganization between Tenneco, Old Kern and petitioner (a newly organized Delaware corporation formed by Tenneco to acquire the business and assets of Old Kern) (124a). This Agreement, which provided for the liquidation of Old Kern and the exchange of Tenneco Preference Stock for Old Kern common stock by Old Kern shareholders, was approved by the Old Kern shareholders at a meeting held on July 17, 1967, at which time Occidental caused its letter setting forth its lack of opposition to the transaction to be read to the shareholders (269a-270a).

On August 30, 1967, the closing of the Tenneco-Old Kern agreement was held. Old Kern transferred its assets and business to petitioner and received shares of Tenneco Preference Stock, which it deposited with the Exchange Agent with irrevocable instructions for distribution of such shares to the Old Kern shareholders upon receipt of their Old Kern stock certificates for cancellation (153a). Thereupon (less than four months after Occidental had acquired its shares), Old Kern's stockholders, including Occidental, ceased to own any interest in Old Kern as an independent operating company, and their Old Kern stock certificates became evidence only of their beneficial ownership of shares of Tenneco Preference Stock (79a-80a). On October

6, 1967, Old Kern was formally dissolved pursuant to California law (82a-83a).

On December 11, 1967, a closing was held under the Option Agreement in Nassau, Bahamas, at which time $84,229,185 was credited to Occidental's accounts at various banks. With this amount, plus the $8,866,230 which had been paid to it in June, Occidental received $93,095,415 with respect to its Old Kern stock (21C). With respect to the 885,649 shares purchased pursuant to its tender offer, this represented a $17,712,980 profit (22C). In addition, Occidental received two dividends totaling $1,793,439.22 with respect to such shares (25C), which, when added to the $17,712,980 profit realized on Occidental's sale of stock, come to a total profit of $19,506,419.22 realized by Occidental by reason of its acquisition and disposition of its 20% beneficial interest in Old Kern common stock.

The Proceedings Below

On October 17, 1967, following the institution of two actions on behalf of Old Kern stockholders, petitioner, as assignee of Old Kern, filed this action pursuant to Section 16(b) for recovery by it of Occidental's short-swing profits. These actions, and a third Old Kern stockholder action subsequently instituted, were consolidated for purposes of pre-trial discovery (44 F.R.D. 543, S.D.N.Y. 1968).

Following certain limited discovery directed to establishing grounds for a motion for summary judgment by plaintiffs, petitioner and the other plaintiffs moved for summary judgment on the basis of the undisputed facts elicited thus far. In an opinion filed on November 27, 1970, Judge Edmund L. Palmieri granted petitioner's motion holding Occidental liable to petitioner for profits of $17,712,980, that being the profit realized by Occidental at $20 per share on the 885,649 shares acquired by it through its tender offer.

Interest at 6% was awarded on the above amount from the dates the monies were received by Occidental. The court found that a "sale" within the meaning of Section 16(b) had occurred *both* by reason of the June 2, 1967 option agreement and by reason of the August 30, 1967 exchange of Old Kern shares for Tenneco shares, either of which had resulted in a short-swing profit to Occidental of $20 per share of Old Kern stock.

Subsequently, the court filed a supplemental opinion awarding petitioner an additional $1,793,439.22, the total amount of the dividends received by Occidental, with interest at 6% from the dates of receipt (25C). Judgment was entered on February 18, 1971 in the total amount of $23,511,337.94 (503a-504a).

On appeal to the Court of Appeals for the Second Circuit, the court reversed Judge Palmieri's entry of summary judgment in favor of petitioner, holding that neither the option agreement nor the exchange of Old Kern for Tenneco shares constituted a "sale". The court further directed summary judgment in favor of defendant Occidental although such relief had not been sought by it in the district court (16A-17A).*

In view of its disposition of the matter, the court did not find it necessary to pass on various issues raised by Occidental on its appeal, including its contention that only those shares tendered to it after it had been tendered 10% of the Old Kern shares outstanding should be the subject

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* Occidental asked the district court "to deny plaintiffs' motions for summary judgment pending a full trial on the merits" (337a). On its appeal, Occidental asserted in one sentence of its 122-page brief that the district court "should have granted summary judgment to Occidental or proceeded to trial on the merits", noting in a footnote that the court had power to grant judgment in its favor despite Occidental's failure to move for such relief. The point was not pressed and petitioner made no response to it since it did not appear to be seriously urged.

of a 16(b) recovery,* and its objection to the award of prejudgment interest and dividends.

Summary of Argument

The decision of the court of appeals below ignores the "mechanical quality" of Section 16(b) recently noted and applied by this court in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418 (1972), and instead, follows an *ad hoc* approach throughout confining itself to particular facts of the particular case. So doing, the court construes the statutory term "sale" narrowly so as to exclude not only Occidental's sale of an option but also the subsequent exchange of Old Kern shares for Tenneco shares. Both of these events occurred less than four months after Occidental purchased over 20% of Old Kern's common stock.

1. First, in holding that an insider's short-swing sale of an option is not a "sale" (despite its acknowledgment that such an option falls within the statutory definition of "sale"), the court of appeals failed to follow long-

* The district court held that Occidental's initial tender offer "constituted a single act of Occidental, whereby the company became a beneficial owner of 10 per cent of Old Kern's capital stock" (18C). Such a purchase has been held to be one making the purchaser a 10 per cent beneficial owner "at the time of the purchase", within the language of Section 16(b), thus bringing the entire transaction (not just the amount in excess of 10% of the issuer's stock) within the scope of Section 16(b). *Stella* v. *Graham-Paige Motors Corp.*, 232 F.2d 299, 300 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956); *Newmark* v. *RKO General, Inc.*, 425 F.2d 348, 355-56 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970). This rule was also applied by the court of appeals in *Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F.2d 918. 924 (8th Cir. 1970), *aff'd*, 404 U.S. 418 (1972), which affirmed the district court holding that a purchase of stock falls within Section 16(b) where the purchaser becomes a 10% owner by virtue of the purchase, in that case (as here) by virtue of a public tender offer. Emerson did not cross-petition for certiorari as to this holding. See 404 U.S. 418, 421.

established criteria for the construction of Section 16(b). An insider is conclusively presumed to have access to inside information not available to other stockholders. In entering into transactions in his company's securities, including the sale of an option, his access to inside information gives him an *opportunity* to profit not enjoyed by other stockholders. Both common sense and the statutory presumption upon which Section 16(b) is premised compel the conclusion that an insider who sells an option is far more likely to profit by such transaction than he is to suffer a loss. Since an *opportunity* for speculative profit is presented, the insider's sale of an option must be held a "sale" for purposes of Section 16(b) liability.

Moreover, assuming *arguendo*, as the court of appeals held, that an option must be shown from the "economic realities" of the particular case to be "in truth and fact a sale", to come within Section 16(b), the Occidental option in issue must be held to be such a transaction. The nearly $9 million paid for the option, Occidental's giving of a proxy simultaneously with its execution of the option agreement, and Occidental's abandonment of its pending demands for representation on Old Kern's board and for production of Old Kern's records make the Occidental option tantamount to an outright sale.

2. Secondly, the court of appeals further erred in holding that, on the particular facts presented, the exchange of Old Kern securities for Tenneco securities was not a "sale" under Section 16(b) (the first occasion on which any court has held that an exchange of securities of one company for those of another company did not constitute a "sale" under Section 16(b)). Here again, the court ignored the "mechanical quality" of the statute and made an *ad hoc* evaluation of what it considered the "equities" of the particular case.

Petitioner maintains that an insider's exchange of the securities of one company for those of a totally different

company, regardless of what may have precipitated such exchange, presents an opportunity for speculative profit and must be deemed within the coverage of Section 16(b) if the purposes of that section are to be given full force and effect.

Moreover, here the court of appeals in effect adopted a rule with respect to tender offerors which the Securities and Exchange Commission, the body given responsibility for adopting exemptive rules under Section 16(b), and which has adopted rules exempting certain non-cash exchanges from the operation of Section 16(b), refused to adopt at Occidental's behest.

I.

The Occidental Option Was A "Sale" Under Section 16(b).

As a Matter of Law, the Option was a Sale

Although "recognizing that, under the statutory definition, § 3(a)(14) [of the 1934 Act], 'sale' includes 'contract to sell'" and that "an option entitling the optionee to purchase is a contract to sell in a dictionary sense", the court of appeals nevertheless held that an insider's "mere grant of an option to purchase is not a sale for purposes of § 16(b)" and that an insider's sale "occurs only when the optionee exercises the option" (13A). It is implicit in such holding that if the option for any reason goes unexercised, the transaction is immune from Section 16(b) liability regardless of what profit the insider may have realized upon the sale of the option.

In formulating such a rule, the court of appeals did not undertake any examination of the speculative possibilities inherent in an insider's short-swing sale of an option but merely cited its own prior decision in *Silverman* v. *Landa*,

306 F.2d 422 (2d Cir. 1962). There the defendant had engaged in a "straddle", *i.e.*, the simultaneous sale of matching put and call options, which the plaintiff attempted to characterize as a purchase and a sale within six months. There was no question there (as is the fact here) of any underlying securities having been acquired by the insider within the prior six months. The court appears to have regarded this "straddle" as an unlikely device for speculative abuse, holding (over the objections of the Securities and Exchange Commission as amicus curiae*), that neither a purchase or sale had occurred and that:

> "Merely because the options may have been entered into for a speculative purpose, it does not follow that they constitute purchases and sales of the type which were penalized." (306 F.2d at 425)

The reasoning of the court of appeals expressed in *Silverman* v. *Landa, supra,* and applied by the court below (despite its recognition that the Occidental option fell within the statutory definition of sale) to the totally different transaction presented here is at variance with long established criteria for the construction of Section 16(b). As Mr. Justice Stewart, while on the court of appeals, noted:

> "Every transaction which can reasonably be defined as a purchase will be so defined if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16(b)." *Ferraiolo* v. *Newman,* 259 F.2d 342, 345 (6th Cir. 1958), *cert. denied,* 359 U. S. 927 (1959).

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* The Commission argued that "the very same factors that led this court to determine in *Blau* v. *Ogsbury* [210 F.2d 426 (2d Cir. 1954)], that the date of exercise of an option is controlling when an insider is a *purchaser* require a determination that the date of issuance is controlling when an insider is the *issuer* of the option". (Emphasis the Commission's) (Brief for Securities and Exchange Commission as Amicus Curiae, p. 19)

Again, in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418 (1972), this court recently held:

> "[W]here alternative constructions of the terms of § 16(b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." (404 U.S. at 424)
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> • • •
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> "In interpreting the terms 'purchase' and 'sale', courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse. See, *e.g.*, *Bershad* v. *McDonough*, 428 F.2d 693 [7th Cir. 1970] (granting of an option to purchase constitutes a 'sale')". (404 U.S. at 424, n. 4)

If (despite the statutory definition of "sale" set forth in Section 3(a)(14) of the Act) an insider's short-swing sale of an option can be considered a type of transaction "where alternative constructions of the terms of § 16(b) are possible", it is clear that the option device is a "type of transaction . . . that gives rise to speculative abuse". In contrast to the decision of the court of appeals here, which held, without discussing the possibilities for speculative abuse, that the "mere grant of an option to purchase is not a sale for purposes of § 16(b)" and that a sale occurs "only when [and if] the optionee exercises the option" (13A), the Court of Appeals for the Seventh Circuit in *Bershad* v. *McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), analyzed the speculative possibilities inherent in an insider's sale of an option and concluded:

> "The insider's sale of options in his stock is *well adapted to speculation and abuse* of inside information *whether or not the option is subsequently exercised*. The sale of the right to purchase the underlying security is itself a means of realizing a profit from that security. The right to purchase stock at a given price under specified circumstances, although

> clearly not identical to the rights attendant upon ownership of the stock itself, derives from and is dependent upon the value of the underlying security. *Sale of such purchase rights provides an easy vehicle for the use of inside information in extracting profits from the stock itself.*" (Emphasis added) (428 F.2d at 698)

Petitioner submits that the decision of the Seventh Circuit in *Bershad* v. *McDonough*, which was cited and quoted with approval in both the majority and dissenting opinions of this Court in the *Reliance* case, rather than the decision of the Second Circuit Court of Appeals here, sets forth the correct interpretation of Section 16(b).

In determining whether or not an insider's short-swing sale of an option is the kind of transaction "which can possibly lend itself to the speculation encompassed by Section 16(b)" (*Ferraiolo* v. *Newman, supra*), we start with the conclusive statutory presumption that the insider has access to inside information. As Judge Learned Hand observed, in one of the earliest decisions interpreting Section 16(b):

> "If only those persons were liable, who could be proved to have a bargaining advantage, the execution of the statute would be so encumbered as to defeat its whole purpose." *Gratz* v. *Claughton*, 187 F.2d 46, 50 (2d Cir.), *cert. denied*, 341 U.S. 920 (1951).

And, as the Court of Appeals for the Eighth Circuit recently held in the *Reliance* case:

> "The intent as to such short-swing transactions was to stop the *possible*, not the actual—for that was considered to be too difficult to prove—use of inside information. It is clear that Section 16(b) applies to every more than 10 percentum beneficial owner without regard to his factual access to or possession of inside information." (Emphasis by the Court) (footnote omitted) *Emerson Electric Co.* v. *Reliance*

Electric Co., 434 F.2d 918, 923-24 (8th Cir. 1970), *aff'd*, 404 U.S. 424 (1972).*

Logic and common sense dictate that one armed with inside information can use such information to his advantage in selling an option. In the first place, he can use such information to determine whether or not to enter into such a transaction, or with respect to the timing of the transaction, doing so only if and when such a course of action appears advantageous to him. Secondly, when he determines that such course of action is advantageous, his presumed access to inside information can enable him to fix a price and terms most likely to maximize his profits. For example, on December 11, 1967, the date the Occidental option was exercised, the Tenneco Preference Stock traded in the over-the-counter market at 93½ bid, 95½ asked (Wall Street Journal, December 12, 1967). Instead of the $8.50 to $10.50 per share profit Occidental would have received had it waited until then to dispose of its Old Kern holdings (letting the six-month statutory period elapse), Occidental in fact received a total of $20.00 per share, or at least an additional $8.4 million, by reason of having entered into the Option Agreement on June 2, 1967, well within the statutory period.

As noted above, in contrast to the Seventh Circuit in *Bershad* v. *McDonough*, the court of appeals here did not

* The *Reliance* case also involved the acquisition by tender offer of stock of an admittedly hostile issuer. There was no evidence that the offeror, Emerson, had actual access to inside information. In fact, litigation was instituted by the target company, Dodge, to enjoin the tender offer. The District Court for the Northern District of Indiana refused injunctive relief finding that Emerson did not have any "insider" information about Dodge and that all its knowledge had been obtained from public sources. Emerson was also denied access to the Dodge stockholder list and had to file suit to obtain it. (434 F.2d 920, fns. 5, 6). Here, Occidental had an extensive examination of Old Kern's non-public records by a five-man team of lawyers and accountants extending over a six-day period (see, *supra*, pp. 5-6).

discuss in any way the speculative possibilities inherent in an insider's short-swing purchase of stock followed by the sale of an option with respect to that stock. Instead, making an *ad hoc* appraisal of the Occidental option, the court of appeals (ignoring Occidental's contemporaneous threats of a proxy fight) accepted Occidental's contentions that the option price was "a reasonable, non-coercive price" (14A), and the Option Agreement itself "a straight-forward business arrangement" (16A).* Consequently, the court of appeals held Occidental's option to be outside the scope of Section 16(b).

Occidental's threats of a proxy fight aside, the idea that 16(b) liability turns in any way upon the question of whether the sales price received by the defendant is "reasonable" or the transaction a "straight-forward" one is novel, to say the least. If a "reasonable" price or a "straight-forward business arrangement" were enough to avoid Section 16(b) liability, any sale on a stock exchange, for example, would be exempted. Suffice it to say that the statute expressly provides for the recovery of "any profit realized", not just excess profits, or profits of dubious origin.

Secondly, the court of appeals, accepting Occidental's argument that the option agreement did not guarantee it a "sure-thing profit", recited ways in which it believed the option agreement might have redounded to Occidental's disadvantage (although in actual fact it proved highly profitable). Thus, the court noted that the option price might have to be refunded if the Tenneco-Old Kern agreement did not close (a possibility that was eliminated well before the expiration of the Section 16(b) six-month period),** that

* As discussed more fully below, pp. 24-25, petitioner did not contend that the option was a sham, but that the terms and conditions of the option were such as to compel exercise of it, making it tantamount to a conventional sale.

** The Tenneco-Old Kern closing was held on August 30, 1967. At that time (less than four months after Occidental had acquired its stock) Occidental became absolutely entitled to retain the $9 million option price.

the option might have gone unexercised "if the bottom had fallen out of the market" (in which case Occidental would still have retained the $9 million option price) or that "the option might have proved disadvantageous to Occidental if the Tenneco stock had boomed or if someone desiring to make a target of Tenneco had come forward with an offer to Occidental." (16A) (*i.e.*, Occidental would conceivably have been able to make even greater profits if it had retained absolute ownership of its Old Kern stock instead of optioning it—a possibility which is also present whenever any insider sells his stock outright for cash instead of retaining it).

The court of appeals' view that the option agreement might, under certain hypothetical circumstances which did not occur, have proved disadvantageous to Occidental, provides no justification for allowing Occidental to retain profits in fact realized. It is well established that a defendant may not offset his short-swing trading losses against his profits. In *Gratz* v. *Claughton*, 187 F.2d 46 (2d Cir.), *cert. denied*, 341 U. S. 920 (1951), Judge Learned Hand "affirmed a judgment of $300,000 against the insider defendant although, during the pertinent periods, he suffered a net loss of $400,000 on trading in the stock for which he was charged under Section 16(b)." *Adler* v. *Klawans*, 267 F.2d 840, 847 (2d Cir. 1959). Given such an uncompromising rule, it would be incongruous in the extreme to permit a defendant who has sustained no losses whatever to show a mere *possibility* of losses or some other potential disadvantage (which we submit was non-existent here) as an excuse for retaining profits *actually* realized. The *possibility* that the insider's speculation may on rare occasions boomerang is no reason for permitting him to keep the fruits of his speculation in the overwhelming number of instances where, as is to be expected, it proves, in fact, to be profitable. Section 16(b) is a remedial statute designed "to squeeze all *possible profits* out of stock transactions" by insiders. *Smolowe* v.

Delendo Corp., 136 F.2d 231, 239 (2d Cir.), *cert. denied*, 320 U. S. 751 (1943) (emphasis added).

Whatever may be said as to the alleged involuntariness of Occidental's subsequent exchange of Old Kern shares for those of Tenneco, there is no gain-saying the fact that Occidental's entry into the Option Agreement was an entirely voluntary, purposeful act on its part. Less than one month after its purchase of better than 20% of Old Kern's common stock, Occidental sought out Tenneco and, mentioning in the same breath a possible proxy fight against Tenneco (*supra*, p. 6), proposed first an outright sale of its stock and then switched to the sale of an option with respect to such stock, on terms that would give it a profit of nearly $18 million if the option were exercised, and nearly $9 million even if it were not. In return for the Option Agreement Occidental received an immediate cash-in-hand payment of nearly $9 million less than one month after it had purchased the stock in question. Ultimately, it realized a total profit of nearly $18 million, exclusive of dividends and interest. Petitioner submits that recovery of this $18 million profit is clearly within both the language and the purpose of the statute.*

In "Truth and Fact" the Option was a Sale

Although refusing to hold that the sale of an option, *qua option*, is a sale for Section 16(b) purposes, the court of

* The fact that the option was not exercised until after the six-month statutory period had passed should make no difference when it comes to recovery of the total profit. The fact that a final cash payment is not received until after the six months have passed is irrelevant when the transaction that results in such profit is entered into within the statutory period. *Blau* v. *Allen*, 163 F. Supp. 702 (S.D.N.Y. 1958). Otherwise, the insider could structure the transaction in a way which would defer receipt of all or most of his profits until the six months had elapsed. Thus, in *Bershad* v. *McDonough*, *supra*, judgment was entered for the total profit realized, $612,000, although only the option premium, $350,000, had been received within the six-month period.

appeals acknowledged that under certain circumstances a court might "look through the form of an option to the economic realities" and "find that in truth and fact a sale had occurred when the 'option' was granted" (13A-14A). This approach, which would impose liability only when the option is a conventional, outright sale in disguise, would not only exempt many insider options (with their profits) from Section 16(b) liability, but would require an *ad hoc* disposition of each option case. The necessity for a factual determination of whether a given option was a *bona fide* option or was one "accompanied by a wink of the eye", to use the language of the court below (15A), would necessarily require "a judicial search for the will-o'-the-wisp of an investor's 'intent' in each litigated case" and inevitably undermine the "mechanical quality" of the statute in this important area. *Cf., Reliance Electric Co.* v. *Emerson Electric Co., supra,* 418 U.S. at 425.

However, even if the court of appeals were correct in holding that only an option which is somehow "in truth and fact a sale" (14A) can be deemed a "sale" for purposes of Section 16(b), the Occidental option meets that test. Again, *Bershad* v. *McDonough, supra,* where the court was able to find, as an additional reason for affirming the judgment below, that the stock in question was "effectively transferred, for all practical purposes, long before the exercise of the option" (428 F.2d at 698), is instructive.

In the *Bershad* case, the defendants purchased approximately 18% of the outstanding shares of Cudahy Company common stock on March 15 and 16, 1967 at $6.75 per share. Some four months later defendants entered into an option agreement under which they were obligated to sell the bulk of these shares at $9 per share on or before October 1, 1967; the optionee paid $350,000 (14% of the purchase price) for the option to be applied against the purchase price in the event of exercise and, in the event of non-exercise, to be

retained by the defendants. At the same time, the defendants gave the purchaser a proxy with respect to the optioned stock, irrevocable until October 1, 1967. Defendant McDonough and his colleagues then resigned as Cudahy directors in favor of nominees of the option purchaser. The purchaser indicated its intention to exercise the option on September 22, 1967, six months and six days after defendants' purchase, and the shares were delivered five days later. On these facts the Seventh Circuit Court of Appeals, affirming a grant of summary judgment to plaintiff, concluded that "the stock was effectively transferred, for all practical purposes, long before the exercise of the option" (428 F.2d at 698).

In the present case, the Occidental option served none of the economic functions which underlie the normal option. It was suggested by Occidental's counsel, in an admitted effort to avoid Section 16(b) liability, only after Occidental had first proposed an immediate outright sale of its Old Kern holdings to Tenneco. The option price amounted to almost $9 million (25 times the amount in *Bershad*), was nearly 10% of the total $93,095,415 purchase price, was to be applied to the purchase price upon exercise of the option, and was to be forfeited if the option were not exercised, leaving little if any realistic possibility of non-exercise.* The execution of the option was also accompanied by the giving of a proxy to Occidental's attorney in which he was "specifically authorized" to vote in favor of Tenneco's acqui-

* As noted above, the court of appeals found a possibility of non-exercise "if the bottom had fallen out of the market" (14A). The same point could, of course, have been made in the *Bershad* case where the optionee was under no legal obligation to take the shares and might well have refused to exercise his option if some unforeseen event had occurred causing the market price of Cudahy shares to plummet. Such a hypothetical contingency did not prevent the Seventh Circuit from finding that "the stock was effectively transferred, for all practical purposes, long before exercise of the option" (428 F.2d at 698).

sition of Old Kern and by his assurance to Tenneco, in turn, that the Occidental proxy would be so voted. Tenneco relieved Occidental's attorney of his undertaking only when it became apparent that Occidental's vote was not needed. (511a) While there was no resignation of directors (Occidental had no representatives on the Old Kern board), Occidental's pending demand for two seats on Old Kern's board was abandoned, as was its pending litigation for inspection of Old Kern's books and records. In short, the Occidental "option" was just as much a sale as of the date it was entered into as the "option" in the *Bershad* case. However, while the Court of Appeals for the Seventh Circuit affirmed a grant of summary judgment *against* the defendants, the court of appeals here directed summary judgment *in favor of* defendant Occidental, although such relief had not even been sought in the district court.

Here, the court of appeals resolved all questions of fact as to the "economic realities" underlying the option in favor of Occidental without trial and without any expert economic testimony having been adduced. For example, the court of appeals' opinion, in its treatment of the option, purports to rely upon "undisputed testimony that the forfeitable down payment, 10.05%, was a reasonable, non-coercive price . . ." (14A). The only such testimony was hearsay testimony given in a deposition by Mr. Walter Davis, Occidental's Vice President, in which he recited what someone from the investment firm of Donaldson, Lufkin & Jenrette allegedly told him (363a-364a).

Mr. Davis' testimony was merely to the effect that he had made inquiry as to an appropriate price for a six-month call on a stock selling for $95, the price at which Old Kern stock was then being traded. There was no indication that Donaldson, Lufkin & Jenrette was informed of the magnitude of the block of stock in question nor of the other terms

and conditions (363a-364a). Because petitioner did not believe it necessary to rebut this hearsay testimony in order to prevail upon its motion for summary judgment (and not being faced with a cross-motion for summary judgment in favor of Occidental), the source of that opinion was never deposed. Such hearsay testimony would be of dubious admissibility at trial, but even if admissible should (assuming its relevance) surely be the subject of cross-examination of the source, and is certainly subject to rebuttal by expert testimony.

Consequently, while petitioner respectfully submits that the district court's grant of summary judgment in its favor was clearly correct under either of the holdings in *Bershad* v. *McDonough, supra,* and should have been affirmed by the court of appeals, at the very least the court of appeals should, given its view of the law, have remanded for trial with respect to the question of whether or not "in truth and fact a sale had occurred when the 'option' was granted" (14A), rather than directing summary judgment in favor of Occidental.

II.

Alternatively, The Exchange Of Kern Shares For Those Of Tenneco Was A "Sale" Under Section 16(b).

Apart from its holding with respect to the option, the court of appeals further held that the August 30, 1967 exchange of Old Kern shares for Tenneco shares (which occurred less than four months after Occidental's purchase of its 20% interest in Old Kern) did not constitute a "sale" by Occidental within the meaning of Section 16(b).

Looking to the facts underlying the exchange, the transaction is clearly one that falls within the statutory definition of "sale". On August 30, 1967, Old Kern transferred its business and assets to petitioner, agreed to dissolve and terminate its corporate existence and delivered the Tenneco

Preference Stock received by it to the Exchange Agent, with irrevocable instructions to deliver the Preference Stock to the record owners of Old Kern stock against the surrender of their Old Kern stock certificates (82a, 16C-17C).

Aside from differing income tax consequences, the net effect of the above events was exactly what would have occurred had Occidental made a cash sale of its Old Kern stock and a cash purchase of a like amount of Tenneco Preference Stock. Occidental's record ownership of Old Kern stock ceased to represent an equity investment in Old Kern as an independent operating company and became merely evidence of its "beneficial ownership" within the meaning of Section 16 of an equal number of shares of the Tenneco Preference Stock. *Blau* v. *Mission Corp.*, 212 F. 2d 77, 80 (2d Cir.) *cert. denied*, 347 U. S. 1016 (1954).

Prior to the decision here, a long line of Section 16(b) decisions had established that an exchange of stock of one company for that of another involves a "sale" of the security surrendered and a "purchase" of the security received on which a profit is realized, just as clearly as if there had been a cash sale followed by a purchase made with the proceeds. Such decisions motivated Emerson's sales transactions in *Reliance Electric Co.* v. *Emerson Electric Co., supra.* As this Court noted in its opinion, Emerson, which like Occidental had acquired its stock position in a cash tender offer, had encountered "certain failure" in its efforts to take over Dodge and was faced "with the prospect of *being forced to exchange* its Dodge shares for stock in the merged corporation in the near future" (emphasis added). 404 U. S. at 420. Emerson wanted to "immunize" a portion of those shares from liability under Section 16(b). Its concern about Section 16(b) liability was understandable. As this Court noted in a footnote to its opinion:

> "The Court of Appeals for the Second Circuit has held that an exchange of shares in one corporation

> for those of another pursuant to a merger agreement constitutes a 'sale' within the meaning of § 16(b). *Newmark* v. *RKO General, Inc.*, 425 F. 2d 348, 354 [2d Cir. 1970]." 404 U. S. at 420.

Similarly, *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F. Supp. 962 (S.D.N.Y. 1965); *Blau* v. *Hodgkinson*, 100 F. Supp. 361 (S.D.N.Y. 1951); and *Gold* v. *Scurlock*, 324 F. Supp. 1211 (E.D. Va. 1971) (appeals pending*), each involved transactions identical in all essentials with the exchange now in issue. In each case, the court found "purchases" of the stock distributed in connection with the sale of the issuer's assets; from this the inference of a "sale" of the stock of the issuer by those receiving the stock so distributed is inescapable.

So also, in actions arising under Section 10(b) of the 1934 Act, an exchange of securities in different companies has been uniformly held to be a "purchase" or "sale" of such securities. *E.g., SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969) ("shareholders 'purchased' shares in the new company by exchanging them for their old stock"); *Dasho* v. *Susquehanna Corp.* 380 F. 2d 262 (7th Cir. 1967), *cert. denied*, 389 U.S. 977 (1969) ("an acquisition or disposition of securities in exchange for other securities falls within the statutory definitions [Secs. 3(a)(13) and (14)]"); *Vine* v. *Beneficial Finance Co., Inc.*, 374 F. 2d 627 (2d Cir.), *cert. denied*, 389 U. S. 970 (1967).

In reaching a contrary result in this case, the very first time that an exchange of securities in different companies has been construed to be anything other than a "purchase" or "sale" of such securities under the Securities Exchange Act of 1934, the court of appeals expressed its view that to deprive Occidental of the $18 million profit it realized on

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* On May 22, 1972, the Court of Appeals for the Fourth Circuit, noting "with interest" this Court's grant of certiorari in this matter, entered an order deferring final disposition of the appeals until this Court's decision had been rendered.

the exchange would be "repugnant to our sense of equity" (13A). This was the first occasion, so far as we can determine, that that venerable doctrine has been invoked by any court to avoid the imposition of Section 16(b) liability.*

The court of appeals also expressed apprehension that the imposition of Section 16(b) liability upon the "unsuccessful" tenderor, such as Occidental, would "discourage the making of such offers" (13A). Assuming this to be a proper subject of concern, it would seem, however, likely to discourage only those tender offers made primarily with a manipulative objective in mind. The vast majority of *bona fide* tender offers are made with a view to securing ultimate control of the target company, not a quick profit. On the other hand, some tender offers are undoubtedly made with a view to driving up the price of the stock and realizing manipulative profits. As the then Chairman of the Securities and Exchange Commission testified in hearings before the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (on H.R. 14475 and S. 510, at p. 22, July 1, 1968):

> "There has been enough experience in the past 2 years for any sophisticated takeover bidder to know that, unless management joins him, management will seek another partner and that other partner probably will make a slightly better offer. We have the

* In Section 16(b) actions, courts have consistently refused to entertain defenses of an equitable nature, such as unclean hands and estoppel. See *e.g., Magida* v. *Continental Can Co.*, 231 F.2d 843 (2d Cir.), *cert. denied*, 351 U.S. 972 (1956); *Allied Artists Pictures Corp.* v. *Giroux*, 312 F.Supp. 450 (S.D.N.Y. 1970); *Newmark* v. *RKO General, Inc.*, 294 F.Supp. 358, 367 (S.D.N.Y. 1968); *Volk* v. *Zlotoff*, 285 F.Supp. 650, 655-56 (S.D.N.Y. 1968); *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F.Supp. 962 (S.D.N.Y. 1965); *Jefferson Lake Sulphur Co.* v. *Walet*, 104 F.Supp. 20 (E.D.La. 1952), *aff'd*, 202 F.2d 433 (5th Cir.), *cert. denied*, 346 U.S. 820 (1953). On the basis of such authority, the district court dismissed Occidental's affirmative defenses and counterclaims (23C).

> feeling that many of these people are doing it for the short-term gain, or, to use the vernacular, to make a fast buck. We have a number of variants of that. We have a sitution where almost overnight [a] particular individual or company made several millions of dollars in a situation of this kind.
>
> "We have the feeling that some of these offers are made only to initiate that activity."

In giving the above testimony, the Chairman could well have had Occidental in mind. As an article on tender offers, in the August 1967 issue of *Fortune*, states:

> "[W]hile Occidental failed to win control of Kern, it could look forward to a gross capital gain of more than $17 million on the Kern shares it had acquired. 'That', Armand Hammer [Occidental's President] observes, 'isn't bad for two weeks' work'." (p. 109)

While there may be other remedies to deal with the problem of speculative tender offers, it does not follow that Section 16(b) should be denied any role. Given the "prophylactic" remedy embodied in Section 16(b), *Blau* v. *Lehman*, 368 U. S. 403, 414 (1962), imposition of such liability would seem well designed to curb such offers.

Instead of addressing itself to such considerations, the court of appeals took it for granted that the losing contestant in a take-over effort cannot possibly reap a speculative profit, drawing upon particular facets of the Occidental tender offer. Such an *ad hoc* approach (apart from encouraging insiders to litigate each case) ignores the possibilities for speculative abuse inherent in any situation where two companies propose to merge and a large recently-acquired dissident block of stock is outstanding in one of them. Aside from his ability to affect the terms and conditions of the merger itself, the insider holding such a block can use his stock position to make a profitable

arrangement, not available to other shareholders, for himself. This is exactly what Occidental did here in carrying forward its threats of a proxy fight, supported by legal demands and litigation (which enabled it to secure an extensive inspection of Old Kern's non-public books and records), until it was able to secure a special (and very profitable) arrangement for itself in the form of the Option Agreement.

Apart from its refusal to promulgate an exemptive rule on Occidental's behalf, the Securities and Exchange Commission has also taken a position contrary to that adopted in the opinion below. In 1964, the Special Committee on Securities Regulation of the Association of the Bar of the City of New York proposed to the Commission that it adopt a rule excluding exchanges of stock resulting from mergers and corporate acquisitions from the operation of Section 16(b).* In rejecting such proposal by letter dated November 24, 1965, the Commission wrote to the Committee as follows:

> "The Commission has also determined, as recommended by the staff, not to propose any revision in the liability provision of the section as it applies to the transactions of exchange involved in mergers, consolidations, recapitalizations and reorganizations. Our recommendation was based on our belief that there are distinct opportunities to profit from the use of inside information during the period of time surrounding such significant corporate events and that *profits must be deemed 'realized' at the time of exchange if the purposes of Section 16(b) are to be carried out.* This belief is supported by the legislative history of Section 16, court opinions and past Commission statements. We concluded, therefore, that these transactions were encompassed within the purpose of Section 16(b) which, as you know, is to prevent the unfair use of inside information. . . .

* One of petitioner's counsel, whose name appears on this brief, was a member of such committee.

> "We recognize that under certain circumstances, Section 16(b) does create a conflict of interest for an insider who stands to lose profits if a merger, consolidation, recapitalization, or reorganization is not delayed. We concluded, however, that removing the 'teeth' of Section 16(b) to discourage the use of inside information would allow insiders to create and take advantage of speculative opportunities during the time surrounding such significant corporate events which outweighed this potential conflict. Also, *we know that some persons are unwittingly caught by the section in these as in other situations falling within the provisions of Section 16(b), but in our opinion the public interest and the interest of investors are better served in this area by the unrestricted operation of the section.*" (Emphasis added)

Now, the Court of Appeals for the Second Circuit has adopted a judicial rule with respect to exchanges of securities which does, insofar as tender offerors are concerned, what the Commission refused to do in 1965 and which is, ironically, far broader than the limited rule with respect to tender offerors which the Commission refused to adopt at Occidental's behest in 1967.

The court of appeals' treatment of the exchange of securities thus raises a question of general importance to the future application of Section 16(b): Whether the courts may grant *ad hoc* exemptions from Section 16(b) in cases involving so-called "unusual" transactions as opposed to the "garden variety" cash purchase or sale, particularly where, as here, the Securities and Exchange Commission has not seen fit to adopt an exemptive rule. Aside from a few exceptions set forth in the statute, Section 16(b) mandates recovery from an insider of "any profit realized" through the purchase and sale of equity securities of the relevant issuer within a six-month period, but provides that it shall not apply to "any transaction or transac-

tions which the Commission by rules and regulations may exempt as not comprehended within the purpose" of Section 16(b). The statute clearly imposes a broad objective standard of liability, reserving to the Commission through rule-making proceedings of a legislative nature, and not to the courts in individual cases, the power to define types of transactions which should be exempt. The statutory scheme thus provides the possibility of relief for persons deserving it in "situations that Congress scarcely considered" (9A) without undermining the "mechanical quality" of the statute by encouraging every insider to resist recovery and litigate in the hope of persuading a court, as here, that it would be "repugnant" to its "sense of equity" (13A) on the facts of the particular case to require recovery of profit realized in a non-cash transaction.*

Indeed, the Commission has in fact adopted rules exempting certain non-cash exchanges of securities in mergers and other exchanges from the operation of Section 16(b). Rule 16b-6 exempts such transactions when the purchase has occurred by exercise of an option acquired more than six months prior thereto, thereby allowing corporate officers who hold stock options which may be exercisable at well below the then market price and which might be lost as a result of the merger to exercise their options without having the merger itself (which would otherwise be a

* One member of this Court has written with respect to Section 16(b):

> "[I]f the Congress intended to provide additional exceptions, it would have done so in clear language; . . . the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process." *Petteys* v. *Butler*, 367 F.2d 528, 538 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967) (Blackmun J., dissenting).

"sale" of their stock) result in their losing the benefits of the option by reason of Section 16(b). Rule 16b-7 exempts "[t]he disposition of a security, pursuant to a merger or consolidation, in exchange for a security of a company which, prior to said merger or consolidation, held over 85 per cent or more of the equity securities of all other companies involved in the merger or consolidation" or "held over 85 per cent of the combined assets of the companies undergoing merger or consolidation", thereby excluding what are essentially intra-corporate reorganizations involving no change in beneficial ownership.

Here, as noted above, the court of appeals in effect promulgated a rule with respect to tender offerors far broader than the rule which was proposed to the Commission by Occidental and which the Commission expressly refused to promulgate.

Several courts have, of course, concluded that, considered in the light of the purpose of Section 16(b), certain types of transactions, "objectively defined", should not be considered to be "purchases" or "sales" within the meaning of Section 16(b). However, these decisions have been premised upon the conclusion that there was no possibility of speculative abuse where the transaction did not involve a real change in the equity investment of the insider (which in fact was maintained for more than six months)* or where the transaction was one which did not result in a profit.** These decisions do not, as the opinion below suggests (9A), con-

* See, *e.g.*, *Ferraiolo* v. *Newman*, *supra*; *Blau* v. *Lamb*, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967) and *Petteys* v. *Butler*, *supra* (conversion of convertible security); *Blau* v. *Mission Corp.*, *supra* (transfer to 100%-owned subsidiary); *Blau* v. *Max Factor & Co.*, 342 F.2d 304 (9th Cir.), *cert. denied*, 382 U.S. 892 (1965) (exchange of substantially identical classes of equity security).

** See, *e.g.*, *Shaw* v. *Dreyfus*, 172 F.2d 140 (2d Cir.), *cert. denied*, 337 U.S. 907 (1949) (private gift).

stitute a "revolt" against the objective character of Section 16(b), but are simply determinations that, in situations of the type considered, a basic element of liability was absent, *i.e.*, either an investment of less than six-months' duration in the issuer or realization of a profit, and that therefore the "transaction" was not one susceptible of "speculative abuse", *i.e.*, the realization of short-term profits by insiders, which Section 16(b) is designed to prevent. None of these decisions suggest that each case should be treated on an *ad hoc* basis; rather, they deal with *types* of transactions which they conclude cannot possibly result, *regardless of the facts of any particular case,* in the kind of abuse at which the statute is aimed.

Unlike the conversion cases noted above, where the courts were able to find that the intra-corporate exchange, standing by itself, presented no possibility of speculative abuse, the court of appeals here did not hold that an exchange of stock of one company for that of a totally different company, standing by itself, could not lend itself to speculative abuse, but instead asserted that the particular facts before it, starting with Occidental's acquisition of its shares in a tender offer, showed no evidence of speculative abuse on the part of Occidental. Indeed, Occidental's brief in opposition to the petition for certiorari acknowledged that the test of Section 16(b) liability applied by the court of appeals here was one which "requires a careful examination of the facts . . . on a case by case basis" and that "[a] decision on the facts of this case cannot resolve future merger cases . . ." (Br., p. 3). Only by undertaking such an *ad hoc* examination of Occidental's situation (and by accepting without trial Occidental's protestations of innocence) was the court of appeals able to conclude, for the first time, that an exchange of securities of one company for those of a totally separate and distinct company was not a "sale" for purposes of Section 16(b).

In contrast to its holding here, the Court of Appeals for the Second Circuit had shortly before expressly held (as

this Court noted in its *Reliance* opinion) that "an exchange of shares in one corporation for those of another pursuant to a merger agreement constitutes a 'sale' within the meaning of § 16(b)". *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U. S. 420, n. 2, citing *Newmark* v. *RKO General, Inc.,* 425 F.2d 348, 354 (2d Cir.), *cert. denied,* 400 U. S. 854 (1970). In its opinion here, the court of appeals described the *Newmark* opinion as merely having held that "an exchange pursuant to a merger *may be* a 'sale'" (emphasis the court's) and confined the holding in that case to "the particular exchange there a issue" (11A).

At least one district court in the Second Circuit did not read *Newmark* v. *RKO General, Inc.* so narrowly. In *American Standard, Inc.* v *Crane Co.,* CCH Fed. Sec. L. Rep. ¶ 93,237 (S.D.N.Y. 1971), a case involving the basic elements presented here—(a) an attempted take-over by purchase of stock, including a tender offer, (b) opposition of the target company, followed by (c) a merger between the target company and a different partner—the district court found that the exchange of shares occurring by reason of the merger was a "sale" under the *Newmark* case, stating:

> "It is true that the Court—properly—placed emphasis on the facts that RKO controlled Frontier, had knowledge of the merger, and had a contract right to cancel the agreement, and that its option to purchase Central securities at a fixed price put it in ideal position to profit from an anticipated rise in the price of the stock—facts not present in the instant case. However, exceptional as such facts are, at least in combination, they were not elements sine qua non to the finding. Rather they merely underpinned, although emphatically, the opportunity for speculative abuse which there existed."

The foregoing opinion was filed on October 12, 1971, the day before the court of appeals' decision here. Two days later, the district court withdrew its opinion in light of the decision below.

Petitioner respectfully submits that the holding of the *Newmark* case, as it was interpreted by the district court in *American Standard, Inc.* v. *Crane Co., supra,* and by this Court in *Reliance Electric Co.* v. *Emerson Electric Co., supra, i.e.,* that "an exchange of shares in one corporation for those of another pursuant to a merger agreement constitutes a 'sale' within the meaning of § 16(b)" (404 U.S. at 420 fn.), sets forth the correct rule of law.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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Blau v. *Lehman*, 173 F. Supp. 590 (S.D.N.Y. 1959), *aff'd*, 286 F.2d 786 (2 Cir. 1960), *aff'd*, 368 U.S. 403 (1962) 67

Blau v. *Max Factor & Co.*, 342 F.2d 304 (9 Cir.), *cert. denied*, 382 U.S. 892 (1965) 24, 25, 33, 37, 55, 71

Blau v. *Mission Corp.*, 212 F.2d 77 (2 Cir.), *cert. denied*, 347 U.S. 1016 (1954) 62

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Radiation Dynamics, Inc. v. *Goldmuntz*, CCH Fed. Sec. L. Rep. ¶ 93,548, —— F.2d —— (2 Cir., July 5, 1972) 60

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Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 612 (1953) 27

W. J. EITEMAN, C. A. DICE & D. K. EITEMAN, THE STOCK MARKET (4th ed. 1966) 37

Gadsby & Treadway, *Recent Developments Under Section 16(b) of the Securities Exchange Act of 1934*, 17 N.Y.L. FORUM 687 (1971) 35, 64

Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV., Mar.-Apr. 1967, at 135 69

R. JENNINGS & H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS (2d ed. 1968) 36

2 L. LOSS, SECURITIES REGULATION (2d ed. 1961) 32, 40

Lowenfels, *Section 16(b): A New Trend in Regulating Insider Trading*, 54 CORNELL L.Q. 45 (1968) 25

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Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967) 69

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Brief for SEC as Amicus Curiae, *Silverman* v. *Landa*, 306 F.2d 422 (2 Cir. 1962) 29

Hearings on H.R. 14475 & S. 510 Before Subcommittee on Finance and Commerce, House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968) 69

Hearings on S. 510 Before Subcommittee on Securities, Committee on Banking and Currency, 90th Cong., 1st Sess. (1967) 69

Hearings on S. Res. 84 & S. Res. 56 & S. Res. 97 Before the Senate Committee on Banking and Currency, 73rd Cong., 1st Sess. (1934) 62

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H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968) 68

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SEC Securities Exchange Act Release No. 9499 (Feb. 23, 1972) 31

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1059

KERN COUNTY LAND COMPANY,

Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT OCCIDENTAL PETROLEUM CORPORATION

Statutes Involved

The relevant sections of the Securities Exchange Act of 1934, 15 U.S.C. § 78, provide in pertinent part:

Section 3(a), 15 U.S.C. § 78c(a):

> "When used in this chapter, unless the context otherwise requires—
>
> • • • • •
>
> "14. The terms 'sale' and 'sell' each includes any contract to sell or otherwise dispose of."

Section 16, 15 U.S.C. § 78p:

"(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security * * * which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission * * * of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file * * * a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer * * * within any period of less than six months * * * shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * * This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Section 23(b), 15 U.S.C. § 78w(b):

> "The Commission and the Board of Governors of the Federal Reserve System, respectively, shall include in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter. • • •"

Questions Presented

1. Whether the court below was correct in adhering to the long-established objective test of § 16(b) and holding that respondent did not make a short-term "sale" of securities of the issuer when it granted a long-term option on unregistered and then nonexistent securities of another corporation?

2. Whether the court below was correct in holding that the merger engineered by petitioner's parent and its predecessor, in which all shareholders' investments were transformed pro rata, was not a "sale" by respondent, where respondent made no exchange of shares within six months of a purchase, there was no alternative to accepting the results of the merger, and there was no opportunity to make unfair use of inside information?

The Proceedings Below[1]

This action, filed in October 1967, was consolidated for pretrial purposes with three shareholder suits, 44 F.R.D.

1. Citations herein by page number are in the form set forth in the Brief for Petitioner (hereinafter "P.Br."). Citations to depositions indicate the name of the witness and page (*e.g.*, Symonds depos. 1). Record citations to documents not reproduced in the Appendix state the document number used in compiling the Record and the item or exhibit to which reference is made (*e.g.*, Doc't 59, Interrog. 15). Names of persons are as set forth in Petitioner's Brief except that "Old Kern" has been shortened to "Kern."

543 (S.D.N.Y. 1968). An earlier motion for summary judgment had been denied, *id.*, and following additional discovery by interrogatories, depositions and associated production of documents, in which all parties participated, petitioner and the shareholder plaintiffs moved for summary judgment in May 1970 (67a-68a; 494a-495a). The district court granted petitioner's motion for summary judgment (1C-30C) and dismissed the shareholder suits as moot (24C). The shareholders took no appeal.

On respondent's appeal the Court of Appeals for the Second Circuit, in an opinion by Chief Judge Friendly (1A-17A) for the panel, which included Judge Timbers, a former General Counsel of the Securities and Exchange Commission (the "Commission"), and Judge Moore, unanimously reversed and directed dismissal of the complaint on the undisputed facts, as respondent had requested both on brief and at argument. Petitioner did not challenge any facts upon which the court below relied until after it ruled and made no response to the court's inquiry at oral argument as to the possibility of further factual issues (17A). A petition for rehearing or rehearing in banc, in which supposed new matters were pressed, was denied unanimously by the panel and by the full court by a vote of eight to one. Petitioner's assertion here that the twenty-one volume record of this case is "limited" reverses the position it took both before the court below, where it said:

> "[E]ntry of summary judgment came after this litigation had been pending some three years and after extensive discovery had been had. . ."[2]

twice emphasizing the fullness of the factual discovery,[3] and in the district court (72a-73a), where it stated that the "Section 16(b) claims have been fully developed,"[4] urging both courts to rule on the undisputed facts.

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2. Brief for Appellee 2-3.

3. *Id.* 3, 20.

4. Memorandum of [New Kern] in Reply to Defendant's Memorandum Opposing and Intervenor's Memorandum in Partial Opposition to its Motion for Summary Judgment in 67 Civ. 4042 (June 12, 1970), at 14.

Because the court below found no sale within 6 months of a purchase as § 16(b) requires, it did not reach other issues involved in the case. These questions are not before the Court but would remain for consideration on remand if the Court should disagree with the judgment of the Second Circuit below.[5]

Counterstatement of the Case

In its "Statement of the Case" and elsewhere in its brief and petition for writ of certiorari petitioner omits relevant facts and makes certain claims that contradict the record and its own admissions therein. Respondent regrets the consequent need to expand its brief to make a fair factual presentation.

A. Occidental's Attempt to Seek a Merger With Kern

In late March and April 1967 Occidental began to explore the possibility of a merger with Kern County Land Company ("Kern") and consulted Lehman Brothers, its invest-

5. These issues are: (1) whether shares acquired by Occidental *before* it became a 10% holder are subject to § 16(b) Occidental's tender offer was so structured that each transaction with a tendering shareholder was irrevocable, and the purchase of shares from one shareholder was not dependent upon a tender by any other shareholder, so that Occidental owned beneficially, at clearly ascertainable times, less than 10% of Kern's outstanding shares. This does not, contrary to petitioner's contentions (P. Br. 13n.), involve the question in *Stella* v. *Graham-Paige Motors Corp.*, 232 F.2d 299 (2 Cir.), *cert. denied*, 352 U.S. 831 (1956), which was whether the purchase by which one becomes a 10% holder is within § 16(b), but rather the same issue ruled upon by this Court in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418 (1972), involving transactions occurring when Occidental was neither then nor thereby became a 10% holder; (2) The recoverability of regularly declared dividends as "profit"; see *Blau* v. *Lamb*, 363 F.2d 507, 528 (2 Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); (3) the valuation of the alleged "sale" price, if either the merger or option were held to be a "sale"; (4) the propriety of granting prejudgment interest; (5) the rate of post-judgment interest; (6) Occidental's counterclaims and defenses.

ment banker, which advised that a merger would benefit both companies (338a). Occidental's interest and Lehman's subsequent advices were based on usual sources of public record (338a-340a; Commons depos. 23-26; Hellman depos. 11, 74). In mid-April of 1967 (Doc't 59, Interrog. 15) Occidental suggested to Kern a meeting to discuss a possible merger, without response (377a-378a), and Occidental therefore decided upon a public invitation for tenders of Kern shares (378a). On May 7 Occidental advised Kern that it would make such an offer (379a). On May 8 the offer was released to Dow Jones for publication, and the next day notices appeared in newspapers throughout the country (379a; Doc't 59, Ex. A-2).[6]

Effective for one month, Occidental offered unconditionally and irrevocably to purchase any Kern shares tendered up to 500,000 shares for $83.50 per share, on an order-of-receipt basis, paying an additional $1.50 per share to transmitting brokers (118a, Ex. A). Payments would be made, and were made, upon each tender (375a-376a). Occidental reserved the right to accept any tenders in excess of 500,000 shares and to extend the offer on public notice. The offering price was about $20—or thirty percent—above the Kern stock's last prior closing market price (63⅝) and was fixed with Lehman Brothers' advice, based upon published data (339a-340a; 118a, Ex. A). By May 10 the aggregate number of tenders exceeded 500,000, and on May 11 Occidental announced an extension for an additional 500,000 Kern shares (383a). The notice advised Kern shareholders to consult a "reputable independent financial adviser" (120a, Ex. B).

6. Publication of the offer was scheduled for Tuesday, May 9, and space had been reserved in the financial press for that date (378a), but it was accelerated due to a spurt of trading in Kern shares on the New York Stock Exchange on Friday, May 5, indicating the possibility of a news leak (378a-379a).

On May 8, the day of Occidental's offer, the Board of Directors of Kern met specially and determined to "use every legitimate means to frustrate Hammer's[7] ambition to take over your Company [Kern]" (398a). In a letter to Kern shareholders dated May 10 (398a-401a) it said, "Our most urgent recommendation . . . is that you do NOT tender your shares" (398a). It warned that Occidental "must" make further offers "and the price certainly would not be less" (399a). It stated that Kern had "in hand at this time a number of offers from strong and reputable corporations to discuss merger possibilities—mergers that could result in tax-free exchanges * * *" (399a), which was incorrect and misleading.[8] Arguing at length that Kern's earnings were only temporarily depressed, it urged shareholders to "retain your shares * * * and participate in the growth [ahead]" (401a), and emphasized Kern's most favorable financial prospects:

> "Armand Hammer, it must be admitted, has evaluated the Company better than have *most outsiders.* He fully appreciates the fact that our 1.8 million acres of land are carried on our books at a fraction of their market value and that no discovery value is assigned the oil reserves underlying our California lands. Obviously he, too, sees the growth ahead that we expect for KCL." (400a; emphasis added).

On May 11, on the extension of the offer, Kern sent a telegram to its shareholders, stating that "[HAMMER'S] GRAB FOR YOUR SHARES IS A RAID" and concluding "DO NOT TENDER YOUR SHARES" (401a). And on May 15 it again wrote its shareholders stating that "KCL is adamant in its position that control by Occidental would be detrimental to our Share Owners" (402a).

---

7. President of Occidental.
8. See pp. 8-9, *infra.*

This bitter campaign led the district court to find without dispute that Kern "vigorously resisted" Occidental's offer (8C). Nevertheless, Occidental renewed its efforts to open negotiations, and on May 17, with the aid of Lehman Brothers, it presented a merger plan to Kern, and then, upon learning that Kern's directors would meet on May 19 to consider merger proposals (385a), it enriched its proposal and resubmitted it on the morning of May 19, both offers made as a basis for negotiation.[9] Kern remained unwilling to negotiate with Occidental on any basis (385a; 7C). When Occidental telephoned Kern late on May 19, it was told that its directors had "already made a deal" and was instructed to "read it in the morning newspaper" (43a-44a).

Kern's news release stated that Tenneco, Inc. ("Tenneco") had offered a corporate combination[10] featuring a tax-free exchange of a new $5.50 Tenneco convertible preference stock, with a liquidation value of $100, callable in ten years at $110, for each Kern share and that Kern's directors had voted "unanimously" to accept the offer (403a-404a). Lehman Brothers estimated that the proposed Tenneco stock should be worth $105 per share (361a-362a), and Occidental noted this estimate in its report to shareholders dated May 19 (328a, Ex. D at D7-D8).

Before Occidental's tender offer Kern had no merger plans (Doc't 102, Ex. C, par. IV, A3(b)), and no offers, and the Tenneco and Occidental offers were the only ones ever received (262a-263a; Cochran depos. 141-143). The first Kern-Tenneco contact was on May 10 or 11, when the Chairman of Kern (Montgomery) and Tenneco's late Chairman

9. The proposals were not presented as hard offers because Occidental had no access to current data on the value of Kern assets (340a; Davis depos. 23).

10. For purposes of brevity we use the term "merger," although the transaction was styled as an exchange of assets for shares. See pp. 18-19, *infra*.

(Gardiner Symonds) agreed by telephone to meet (258a; 388a). Tenneco asked to examine all of Kern's records before it would consider any offer (343a). On May 11 Tenneco began a study of Kern's records, which continued through May 18 (259a). Not until May 15 did Kern and Tenneco first meet and discuss "the extent of Tenneco's interest in Kern and in a general way the broad basis of a possible corporate combination," and no offer was made (259a; 343a; 61a). Tenneco required more information before making an offer (344a; 341a), was given an office within Kern, and assembled "a great mass of detailed information" on Kern's farming, cattle, land, and oil interests (342a). Kern told Tenneco to act quickly (Symonds depos. 14) and make its best offer first (259a). Tenneco's first offer was submitted on May 18 (278a-280a) and was accepted the next day (272a-277a). For obvious strategic reasons Occidental was not made privy to Kern's plan to interpose Tenneco (388a-389a; Davis depos. 26-27). It is conceded that Tenneco, in contrast to Occidental, had access to inside information, including internal reports on oil exploration efforts, and that its offer was based thereon (341a-344a, 388a-390a; 11A n.12).

B. Aftermath of Tenneco's Offer; the Tenneco-Occidental Option Agreement

The May 19 announcement of the Tenneco proposal quashed Occidental's bid. Although its tender offer was irrevocable until June 8, after May 19 only 3,376 Kern shares were tendered on scattered dates through June 5 (387a). Given the high price of the Tenneco offer, Occidental's executive vice president, Walter Davis, believed it was clear that "even if Occidental waged a costly and bitter proxy fight, it was unlikely that the KCL-Tenneco transaction could be stopped" and persuaded Occidental's management of that view (345a). Occidental turned its attention to problems involving its $75 million minority position in Kern after the failure of its offer.

On May 22 Occidental asked to examine Kern's records in order to evaluate the fairness of the Tenneco offer, which would be put to a shareholder vote (286a-287a). Every shareholder of a California corporation has the right to inspect its share register, books of account, and director, shareholder, and committee minutes.[11] Kern refused to disclose any records unless Occidental stated in writing the reasons for its request (468a), and Occidental complied (287a-288a; 468a). On May 24 Kern refused to permit Occidental to examine or make extracts of its share register (468a) or to see any records concerning the Tenneco offer and the alleged other offers (469a).

Consequently on May 25 Occidental petitioned the California Superior Court to require Kern to disclose such records (296a-299a). On May 29 Occidental made a second written request for information, including a description and inspection of Kern's assets (289a-293a). Kern again refused to divulge such information, and Occidental filed a second petition on May 31 (474a-483a). The total of Kern's eventual disclosure met the bare legal minimum—minutes of proceedings antedating the Tenneco offer and books of account, all available by law to any shareholder—except that Kern would not produce its share register. None concerned the Tenneco offer[12] nor the claimed (but nonexistent) other merger offers (469a; 475a-476a; 389a; Doc't 59, Ex. D). Kern's president frankly admitted that Occidental

11. CAL. CORP. CODE § 3003 (West 1955) provides: "The share register or duplicate share register, the books of account, and minutes of proceedings of the shareholders and the board of directors and of executive committees of the directors * * * shall be open to inspection upon the written demand of any shareholder * * * at any reasonable time, for a purpose reasonably related to his interests as a shareholder * * *."

12. Kern claimed that no minutes relating to any merger proposals had been prepared and refused to produce meeting notes. Such notes were not specifically covered by the California statute (469a; note 11, *supra*).

never had the access to Kern's records, personnel, and confidential reports which Tenneco had been freely given (Cochran depos. 66-67).

On May 23, before Occidental saw any records, Walter Davis requested a meeting with Mr. Symonds, who said he was "very busy" and could not see him until May 30 at his home in Houston (44a; 252a). Their meeting on that date concerned the prospect that Occidental, having sought a merger with Kern, would be made a large minority shareholder of one class of Tenneco stock if the merger took place. Before the meeting Symonds and the Tenneco management concluded that was "an unfavorable part of the transaction, but we didn't think it was critical" (346a; Symonds depos. 37-38). Occidental had not won control of Kern and had no interest in a locked-in minority position in Tenneco (392a). Pursuing a logical business solution, Davis asked Symonds if he was intersted in acquiring Occidental's Kern stock, and Symonds said he was (Symonds depos. 40; Davis depos. 90-91) but suggested a "possibility of a 16B problem" (46a). Davis replied that they "obviously" could not "make any disposition of our stock or make any other moves which are illegal" and that they both would have to be guided by counsel on the matter (46a). At Symonds' suggestion (47a) the meeting was adjourned until June 1 at his counsel's office in New York.

In both its petition and brief, petitioner erroneously asserts that in the May 30 meeting Occidental made "contemporaneous threats of a proxy fight" (P. Br. 20, 31; Pet. 19) and cites Davis' statement to Symonds that "Occidental did not want to get into a proxy fight" (P. Br. 6), thereby turning the statement completely around.[13] Symonds, the

13. In view of petitioner's reliance here on erroneous statements on these and other matters, we have felt the need to set the record straight, but none of these matters would support a result different from that reached by the court below or require further consideration, since they cannot convert transactions which are not sales under § 16(b) into sales.

supposed recipient of "threats," had no recollection of *any* mention of a proxy fight in *any* meeting between Tenneco and Occidental;[14] Davis rejected any such innuendo (Davis depos. 41),[15] and both petitioner and Tenneco flatly denied any such threats in their pleadings.[16]

On June 1 Davis, with Occidental's counsel Pillsbury Madison & Sutro (Albert Brown and Bruce Mann) met with Tenneco and its counsel Cahill Gordon Sonnett Reindel & Ohl (F. Arnold Daum) at the latter's New York office. Symonds assured Davis that Tenneco would do anything within the law to aid Occidental in avoiding acts which might trigger § 16(b) liability (347a-350a; Symonds depos. 83-85).[17] The morning was spent on legal research (48a). Discussion then focused on a proposal that Occidental grant to Tenneco Corporation (a Tenneco subsidiary) a long-term option to purchase such shares of the proposed preference stock as Occidental might receive if Kern merged with Tenneco (129a-133a). Both parties' attorneys

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14. "Q. In your conversations with Mr. Davis over the May 30th-June 2nd period, was there any mention made by anyone of the possibility of a proxy fight by Occidental in opposition to the proposed sale of Kern assets to Tenneco? A. If so, I don't remember it. It was obvious that they could but I don't remember any such discussion" (60a).

15. Davis told Occidental's directors several times that a proxy fight was too costly to consider and had poor prospects (Davis depos. 28-29, 47), in which they concurred (*Id.*).

16. In actions consolidated with this case for pretrial Tenneco and and New Kern in their answers denied (36a; 39a) that the stock held by Occidental "constituted, and in fact was employed by Occidental, as a substantial threat to the approval" of the proposed merger (35a) and that:

> "Occidental threatened to vote against such plan and to solicit Kern's other stockholders to vote against it" (37a)

—*i.e.*, threatened a proxy fight.

17. Davis testified that Symonds affirmatively assured him that Tenneco would be glad to cooperate in avoiding acts which would create § 16(b) problems (347a-348a; 356a); Symonds testified that he had implied it (350a).

conferred in drafting the agreement and finalized its terms the next day (48a-49a). Both negotiators were unfamiliar with the technical requirements of § 16(b) (347a; 349a); Occidental relied entirely on the advice of counsel (48a-49a; 349a), as did Tenneco in honoring its offer to help (349a), and both negotiators were led to believe that the grant of an option did not violate § 16(b). Symonds, summarizing counsel's discussions, testified that "there might be a 16(b) problem and that counsel for Occidental and counsel for Tenneco agreed on this document, the option agreement and that was it" (350a), and believed that they had done "everything possible" to avoid triggering § 16(b): "I think we had done that * * * in writing an option to purchase Tenneco preference stock which option was not exercisable until six months after the transaction and that was as far as I knew anything about 16(b) * * *" (349a-350a). Counsel for Kern was advised by Tenneco's counsel of the grant of the option (Doc't 36, Interrog. 44) and in turn advised Kern's management that it was an option and did not violate § 16(b) (353a-354a; 359a-360a; Cochran depos. 49). Based upon such advice the Kern-Tenneco proxy solicitation material concerning approval of the merger described the option agreement but made no suggestion of any possible § 16(b) liability[18] (492a, Ex. 1 at 3; Symonds depos. 27; Doc't 110, No. 8(c)).

Occidental's counsel was also concerned over possible § 16(b) claims with regard to the proposed Tenneco stock if Occidental were to sell any Tenneco preference stock within six months of the merger (223a). Such claims could be avoided if Tenneco postponed the registration of the new stock under § 12 of the Act until after the option was exercised or expired, since the owner of unregistered shares

18. Possible corporate claims under § 16(b) must be reported as such in solicitation or offering material if they exist, SEC Schedule 14A, 17 C.F.R. § 240.14a-101, Item 7(e)(4)(1972).

would not be within § 16.[19] Tenneco agreed to do so (241a-243a). In mid-June its counsel indicated that it had taken steps accordingly, and in exchange therefor Occidental dismissed its petitions for inspection (178a-180a; 318a-320a; 327a-328a). Tenneco's chairman called this delay "a perfectly harmless thing to do" (Symonds depos. 91).

A second potential § 16(b) problem was that the transmutation of Occidental's investment, if the merger closed within six months of Occidental's purchases, might be alleged to be a § 16(b) "sale". While a proxy fight might at least have delayed the merger, Occidental could not oppose it on the merits and was disinclined to oppose it merely for delay (223a). Instead Occidental applied to the Commission for a new rule of general application, "16b-11," to exempt such cases (202a-238a). Tenneco assisted, and Occidental kept Tenneco's counsel informed of various developments[20] (239a-240a). Although Occidental had some encouragement regarding the possible adoption of such a rule (186a-187a), the Commission took no action while expressing no view on the merits of this case (104a;

19. This would avoid any allegation that Occidental was required to hold the Tenneco shares received for an additional six months after the merger, subjecting it to a *double*, more than one year, holding period (5A-6A n.6). In separate litigation it was held that the Tenneco shares were not subject to § 16(b). *Goodman* v. *Tenneco, Inc.*, 68 Civ. 184; *Feinberg* v. *Tenneco, Inc.*, 68 Civ. 350 (S.D.N.Y., July 24, 1968) (Metzner, J.).

20. The Pillsbury firm wrote to Tenneco's counsel regarding a call from Phillip Loomis, Jr., General Counsel of the SEC, relating that Mr. Loomis was "sympathetic" to the dilemma of a shareholder in Occidental's position, which might be forced to resort to litigation to stop the so-called "merger-sale" (239a-240a). On the basis of this exchange of views petitioner apparently claims that Occidental had actually decided to initiate litigation in the event no rule were adopted and the merger closing were accelerated (P. Br. 9n.). Its reference to subsequent litigation fails to note that its closing of the merger took place in violation of an injunction issued by a Texas court (435a-454a) and thus also in violation of the Plan of Merger (432a; 124a, Ex. D at D19).

180a-181a; 190a-191a; 199a-201a; 63a-66a).[21] As a further precaution Occidental thought that it had Tenneco's agreement to delay the closing if no rule were issued (347a-350a), but Tenneco disputed that its assurances included such an understanding, and the issue had no part in the decision below (17A).

Petitioner's statement of the case interlaces the Davis-Symonds negotiations with accounts of Occidental's efforts to see Kern's records, erroneously implying that by seeking inspection and otherwise Occidental pressured Tenneco into the option agreement (P. Br. 5-7). Petitioner and Tenneco pleaded otherwise, flatly denying that the purpose and effect of the option agreement was to secure Occidental's nonopposition or support (35a-37a; 39a-43a), and Tenneco maintained in its interrogatory answers that the option was not used to conciliate Occidental.[22] Occidental had already decided not to fight the merger (345a; Davis depos. 28-29); Davis told Symonds so in their first meeting (345a), and Occidental's counsel so informed Tenneco's counsel (Doc't 59, Interrog. 30; Doc't 37, Interrogs. 23, 25). Symonds testified that he neither sought nor bargained for Occidental's neutrality or favor[23] and turned aside a suggestion

21. Petitioner made no contention below that the Commission's declining to adopt a new rule has any significance. The court below noted, "It is not contended that we should draw any inferences from this, and we do not do so" (6A n. 7).

22. "INTERROGATORY No. 52. State whether the purchase by Tenneco or Tenneco Corporation of said option from Occidental was conditioned upon Occidental's either supporting the proposed sale of Kern's assets to Tenneco or agreeing not to oppose such sale. ANSWER TO INTERROGATORY No. 52. No" (366a).

23. "Q. Was there any discussion either on May 30th or June 1st or 2nd to the effect that if Tenneco bought the Kern stock from Occidental, Occidental would either vote in favor of the sale of assets or not oppose the sale of assets from Kern to Tenneco? A. To the best of my knowledge, those subjects were not mentioned" (60a).

that Occidental's possible opposition had a part in the negotiation of the option.[24] Similarly, Kern's management regarded Occidental's position to be so unimportant to approval of the merger[25] that it never considered measures to secure its cooperation or acquiescence (62a; 366a).

C. Terms of the Option Agreement

The option agreement of June 2, 1967 gave Tenneco Corporation a "call" option not on Occidental's Kern shares but on the then nonexistent Tenneco preference stock Occidental might receive if the merger were consummated. The option was exercisable only after December 9, 1967[26] and before either December 31, 1967, if the closing of the merger occurred prior to December 10, or the thirtieth day after the closing, if it occurred on or after December 10, 1967 and prior to July 1, 1968. Occidental agreed to hold its Kern shares for a term of over 6 and up to 14 months. In return for such privilege Tenneco Corporation paid Occidental a "premium" of $8,866,230 ($10 per share), but if no merger occurred by July 31, 1968, Occidental would have to return the premium and would, of course, retain its shares. The option was expressly transferable, and Occidental had no power to compel its holder to purchase any of the shares covered (129a-133a).

When the negotiations turned to such an option, Davis telephoned Donaldson Lufkin & Jenrette, Inc., a New York

24. "A. I don't think that was the reason because basically I didn't want to have, assuming that the trade went through, I didn't want to have Occidental as a large preference stockholder of Tenneco" (Symonds depos. 45).

25. Kern's president, Mr. Cochran, testified: "I felt it such a good deal I really didn't care so long as Occidental didn't own any more stock than it owned then, that even if they voted against it, our shareholders would approve it" (368a).

26. This was more than six months after both the expiration date of the tender offer and the date of the option agreement.

investment house, and asked Mr. George Gould[27] for advice on the market rate for a 6-month "call" on a stock selling in the range of the Kern shares and was advised that such a call sold for $9 to $12 a share (47a; 363a-364a; 392a; 225a). Although the option required Occidental to hold the Kern shares for over 6 and up to 14 months, and unless the merger occurred the premium would be returned, the premium was fixed low in the quoted range at $10.00. In pleadings in the cases consolidated for pretrial petitioner and Tenneco specifically denied that the premium was "wholly out of proportion to the value of the option" and that its "true consideration" was Occidental's nonopposition and dismissal of the inspection suits (37a-38a).

The $10 premium was made creditable in the event of exercise against Lehman Brothers' $105 projection of the value of the proposed Tenneco stock (361a-362a), giving the option in substance an exercise price (or "striking price") of $95. The exercise price was not below the current market value of the Kern shares, which were then trading at prices reflecting the Kern Board's acceptance of the Tenneco offer (492a, Ex. A at 6). No one at the meeting had spoken of "down payments" (364a).

In the Kern proxy statement of June 16 Tenneco Corporation stated that it

> "has not determined whether it will exercise its option, ... Depending upon future investment market conditions, Tenneco Corporation may sell the option or the Preference Stock covered by the option; its present intention is not to purchase such Preference Stock as an investment" (492a, Ex. 1 at 3).

27. Petitioner's brief suggests that the identity of the advisor at the Donaldson firm to whom Davis spoke was not a matter of record (P. Br. 25).

Tenneco Corporation did not exercise the option.[28] To comply with a tax ruling, the option was sold on August 16, 1967 to the investment banking firm of Loeb, Rhoades & Company, which thereafter assigned it to the LR Fixed Investment Trust (83a; 225a). Occidental had no part in either transaction (60a).

D. The Plan of Merger

The Plan (124a, Ex. D) was based upon the offer approved on May 19 by Kern's Board (278a-280a) and provided for the sale of Kern's assets to New Kern, a Tenneco Corporation subsidiary, in exchange for one share of the new Tenneco preference stock for each share of Kern stock.[29] Consummation of the merger was contingent on shareholder approval, numerous conditions as to the financial condition of the two companies, the accuracy of representations as to such conditions as of the closing date (124a, Ex. D at D2-D22), a favorable tax ruling (*Id.* D22), and issuance of necessary permits by the State of California (*Id.* D22). The Plan called for a closing between September 30 and December 31, 1967 or at "such other time" as the parties might agree upon (*Id.* D17) and contained omnibus clauses under which the parties could change any terms and waive compliance with any conditions (*Id.* D24).

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28. The opinion of the district court was in error on this point (17C).

29. The new Tenneco stock had a cumulative quarterly dividend of $1.375 fixed by the Tenneco charter. After July 1, 1969 it became convertible into 3.6 shares of Tenneco common stock (124a, Ex. D at D74-D78). As indicated, it would be issued at first without registration under the Act and thus was not initially tradable on a national securities exchange (144a; 410a). The opinion of the district court was in error as to the convertibility of the stock during the relevant period (9C).

E. Shareholder Approval of the Transaction

Kern's management was unconcerned about any opposition by Occidental (368a). The combination was cast as an exchange of assets instead of a merger, enabling its approval by a majority of shares rather than a two-thirds vote and foreclosing any right of appraisal (492a, Ex. 1 at 4).[30] Since shareholders were voting on a 50% increase in the value of their pre-tender offer holdings and a dividend "more than twice as great" as the regular Kern dividend (*Id.* 3), Kern's confidence was justified. By July 5 it had sufficient proxies to pass the Plan; at that time only 0.5% were opposed (Doc't 37, minutes of July 6). At the July 17 special meeting the Plan was approved by over 99% of all shares voted (70.18% of shares outstanding), with Occidental abstaining (269a).[31]

A representative of Occidental appeared at the meeting and read a letter explaining why it did not vote for the merger: that it could not make a better proposal; that it could not get more information on Kern's assets without expensive litigation; that, without making a better offer than Tenneco's its opposition could not be justified; that because it would have preferred an Occidental-Kern merger, it was abstaining; but that it did not challenge the fairness of the proposal (269a; 413a-415a).

F. Acceleration of the Merger Closing

On August 4 Kern and Tenneco executed a "Supplementary Dividend Agreement," reciting their wish to close quickly and enabling them to close before the dates set forth in the Plan and proxy statement (84a; Doc't 129, Ex. A;

30. CAL. CORP. CODE §§ 3901, 4123 (West 1955), 4107, *as amended* (Supp. 1972).

31. This constituted a vote against the proposal under the law governing the proceedings. CAL. CORP. CODE § 3901 (West 1955); 492a, Ex. 1, inside cover page.

192a). Davis went to Symonds and asked him to postpone the closing until December but was refused (355a-358a).

Tenneco applied to the California Commissioner of Corporations for a permit to issue the new preference stock, which was granted over Occidental's objections (181a-197a) on August 30, 1967, and Kern and Tenneco closed on the same day (152a-153a). Concurrently Kern separately assigned to New Kern, in consideration of $10, any and all claims it had under the Act (134a; 83a). The next day Kern wrote its shareholders, announcing that they were "entitled to receive, upon surrender of your certificates of Kern Capital Stock," an equal number of the new Tenneco shares (153a).

G. The Sale

Occidental did not surrender its Kern shares until December 11, 1967 (4a; 13a; 83a). On that day the LR Fixed Investment Trust chose to exercise its option. Occidental tendered its Kern shares for the new Tenneco stock and then delivered sufficient shares to the optionee to meet its obligations under the agreement. The LR Fixed Investment Trust paid Occidental $95 per share, as provided in the option, or $84,229,185 (*Id.*). There are no "short-swing profits" involved in this case.

Summary of Argument

Section 16(b) is a special recovery tool, enacted to deter the unfair use of inside information, and is triggered only by a statutory insider's matched purchase and sale within 6 months of an equity security of the issuer corporation. Petitioner, however, urges the Court to broaden § 16(b) to cover transactions which Congress has excluded from it and to do away with the 6 month rule and other statutory provisions, in the face of the rejection of any such judicial expansion by this Court in *Reliance Electric Co.* v. *Emerson*

Electric Co., 404 U.S. 418 (1972), and *Blau* v. *Lehman*, 368 U.S. 403 (1962), and by the courts of appeals. With no viable policy argument to support it, it would have the Court overturn uniform precedent to impose liability in a case where no abuse of inside information did or could occur, and in which the expressed purpose of the statute cannot possibly be served.

The grant of an option differs basically from a sale of stock, and the difference is decisive under § 16(b). The long-established rule, applied judicially and administratively, is that no "sale" under § 16(b) occurs unless and until both the investor's rights and obligations to sell are fixed and certain. The investor must at least acquire a right to sell shares at a fixed price before § 16(b) may arguably come into play. But one who grants an option makes no "sale" in fact or under § 16(b), *Silverman* v. *Landa*, 306 F.2d 422 (2 Cir. 1962), because he obtains no such right but remains at the risk of the market and the pleasure of the optionee and neither terminates his risks nor realizes any profit.

While in the *Reliance* case and *Blau* v. *Lehman, supra*, this Court rejected "persuasive" and logical arguments for the judicial expansion of § 16(b), here petitioner's argument rests on inaccurate statements as to options and conflicts with the logic of the statute itself. Rather than constituting a device to insure profit, the grant of an option is a risk-bearing encumbrance upon the grantor, which worsens his speculative position and limits his potential profit in relation to the investment and risk assumed. Inherently, it bears no resemblance to the class of transactions which Congress deemed necessary to penalize. Moreover, the option here could be exercised only more than 6 months after the date of its grant, beyond the period when the statute deems inside information to be effective, and could not be included under the statute without an additional violation of its express terms.

All precedent is contrary to petitioner's position, including *Bershad* v. *McDonough*, 428 F.2d 693 (7 Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), which shows by contrast the correctness of the decision below. There the defendant had granted no option in fact, which entails a premium above a stock's current market price, but had instead demanded a down payment of a substantial part of its price. It was a so-called "deep in the money" spurious option, wherein the down payment so lowered the exercise price of the purported "option" that the defendant made abandonment of the sale all but impossible in the *short-term* period during which the remaining installment could be paid. Coupled with the immediate passage of virtually all incidents of stock ownership, that agreement was merely a disguised sale under the test correctly articulated and applied here by Judge Friendly.

The option here bears no resemblance to the *Bershad* agreement, and there is no basis for finding that it was other than an option. The circumstances in *Bershad* have no counterparts here, and the array of irrelevant factors pressed by the petitioner cannot through some "ad hoc" alchemy convert an option into a sale, and that disposes of matter under § 16(b).

Nor may Kern's and Tenneco's merger artificially be labeled a "sale by Occidental." No case decided under § 16(b) has suggested that an event controlled by others which gave a defendant no option not to participate could be labeled as *his* "sale," and petitioner has failed to establish any sale or exchange by Occidental within 6 months of a purchase. Even if this fatal defect in its case were passed over, application of the accepted "possibility of abuse test" yields exactly the same result. A merger conceived after an investor has irrevocably offered to buy shares, and in which all shareholders' investments are altered on a pro rata basis, cannot serve as a vehicle for special insider's

profit, no matter what informational advantage concerning the issuer the investor may later acquire, and here did not acquire.

Petitioner's position fails to meet the requirements of § 16(b) and cannot serve the statutory purpose, but instead would impose a whole range of new abuses and burdens on both stockholders and the courts. It would force defeated tender offerors to engage in groundless opposition merely to delay mergers, while giving incumbents and their favored merger partners overpowering new weapons against tender offers through manipulation of the statutory scheme. It would make liability turn upon a bizarre contest between competing bidders to accelerate or retard the closing of a merger. It is a perversion of the statute's purpose in its own right and would thwart the most recently expressed policy of Congress, which took "extreme care" to maintain the competitive balance in contests for control.

No exemption or "ad hoc" inquiry is necessary to reject the two baseless theories by which insiders-in-fact sought to take advantage of a past competitor's entangled situation by attaching the artificial label of "insider" to him, in order to gain a windfall recovery. The court below properly rejected these on their merits, consistently with the uniform, indeed exclusive, interpretation of the statute.

POINT I

The Grant of an Option to Buy was not a "Sale" by Occidental, Nor May It Be Deemed Such.

A. Section 16(b) Has No Application to the Grant of an Option.

Section 16(b) was enacted to counter sure-thing trading by officers, directors, and large shareholders "in the stock of their own companies with the benefit of advance information," S. Rep. No. 792, 73rd Cong., 2d Sess. 9 (1934). "The expressed purpose of this provision is to prevent the unfair use of inside information," *id.* 21, which may accrue to an insider "by reason of his relationship to the issuer," 15 U.S.C. §78p(b). It is a rule of automatic recovery which is as limited in its scope and purpose as it is severe in its impact.

Section 16(b) is triggered only by a statutory insider's matched purchase and sale of an equity security of his corporation within 6 months and leaves untouched such transactions 6 months and 1 day apart, trading by large shareholders owning less than 10%, and shareholder transactions before 10% ownership is reached and after it is relinquished.

> "[I]ts general purpose is to preclude the unfair use of inside information which may have been obtained by corporate insiders. . . . But Congress did not seek to accomplish the whole of this purpose by Section 16(b) alone. Section 16(b) creates a special remedy applicable only in a limited situation. . . . [O]ther remedies are . . . available, but only upon proof of actual wrongdoing."

Blau v. *Max Factor & Co.*, 342 F.2d 304, 307 (9 Cir.) (footnote omitted), *cert. denied*, 382 U.S. 892 (1965); see *Reliance Electric Co.* v. *Emerson Electric Co.*, *supra*, 404 U.S.

at 422; *Adler* v. *Klawans*, 267 F.2d 840, 845 (2 Cir. 1959). Courts have repeatedly rejected litigants' assertions of "other possible abuses" of conversions, options, dividend practices, or corporate position as either a basis for, or as "coloration" to induce, a finding of § 16(b) liability.[32] The list of acts, persons and abuses within the scope of its "extraordinary liability," *Blau* v. *Lehman, supra*, 368 U.S. at 409, may not be broadened, and this Court has so held on both occasions on which it considered the statute. *Reliance Electric Co.* v. *Emerson Electric Co., supra; Blau* v. *Lehman, supra.*

This view contrasts with that taken of § 10, the Act's broadly-based antifraud provision, which partially overlaps in purpose with § 16(b) but has a different function. Section 10 offers a federal remedy against those who are proved to have done actual harm, whereas § 16(b) imposes liability without proof of harm.[33] Because acts which trigger § 16(b)'s automatic recovery may be inherently innocent, efforts taken to avoid liability are not disapproved. "[T]here is no reason why a person may not conduct his business in such a way as to . . . eliminate his loss of profits

32. *Blau* v. *Max Factor & Co., supra; Blau* v. *Lamb*, 363 F.2d 507, 521, 522-23 n. 22 (2 Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *Blau* v. *Ogsbury*, 210 F.2d 426, 427 (2 Cir. 1954); *Falco* v. *Donner Foundation, Inc.*, 208 F.2d 600, 604 (2 Cir. 1953); *Truncale* v. *Blumberg*, 80 F. Supp. 387, 391 (S.D.N.Y. 1948); see *Roberts* v. *Eaton*, 212 F.2d 82, 85 (2 Cir.), *cert. denied*, 348 U.S. 827 (1954); *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 235 (2 Cir.), *cert. denied*, 320 U.S. 751 (1943).

33. Compare, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Superintendent of Ins.* v. *Bankers Life and Casualty Co.*, 404 U.S. 6 (1971); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2 Cir. 1971), *cert. denied*, 404 U.S. 1005 (1972); *Heit* v. *Weitzen*, 402 F.2d 909 (2 Cir. 1968), *cert. denied*, 395 U.S. 903 (1969). Indeed, the efficacy and breadth of § 10 eliminates any need for expansion of § 16(b). See, *e.g.*, Lowenfels, *Section 16(b): A New Trend in Regulating Insider Trading*, 54 CORNELL L.Q. 45, 61-64 (1968); Note, *Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?*, 58 VA. L. REV. 907, 914-915, 928-929 (1972).

under Section 16(b) by any means permitted by law." *Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F.2d 918, 925 (8 Cir. 1970), *aff'd*, 404 U.S. 417, 422 (1972). Also, because recovery is not premised upon wrongdoing, adherence to precedent has been specially emphasized so that unambiguous warning may be given. See *Blau* v. *Lehman*, 286 F.2d 786, 789 (2 Cir. 1960), *aff'd*, 368 U.S. 403, 413 (1962).

The contention that one who grants a "call" thereby "sells" his shares under § 16(b) is devoid of logical support and contrary to precedent. A "call" is an option which gives a person the right to buy from the grantor a specified amount of securities at a stated price within a certain time.[34] The respective positions of the grantor ("optionor") and the holder of an option ("optionee") are entirely different. The holder acquires the "right to choose to conclude or not to conclude a particular transaction" at some future time, *Bershad* v. *McDonough*, 300 F.Supp. 1051, 1053 (N.D. Ill. 1969), *aff'd*, 428 F.2d 693 (7 Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), which gives him, in consideration of a minimal payment, firm assurance that he can acquire an equity position at a fixed price, with no obligation ever to purchase. The grantor, on the other hand, offers to deliver shares at a stated price, if and when called upon to do so, but acquires no right to cause any sale of shares at any price or time. He may be required to sell at the pleasure of the holder, but he retains his shares at the risk of the market. The grant of an option thus lies wholly outside the scope of § 16(b).

The "long-established criteria" of § 16(b) (P. Br. 13-14) are that there is neither a "purchase" nor "sale," nor a "contract to" purchase or sell under § 3(a)(13), (14) of the

34. A "put" is an option which gives a person the right to sell to the grantor of the put a specified amount of securities at a stated price within a certain time.

Act, unless and until both the rights and obligations of an investor to acquire or dispose of securities at a stated price are fixed. *Stella* v. *Graham-Paige Motors Corp.*, 232 F.2d 299, 301 (2 Cir.), *cert. denied*, 352 U.S. 931 (1956); *Falco* v. *Donner Foundation, Inc.*, 208 F.2d 600 (2 Cir. 1953); *Shaw* v. *Dreyfus*, 172 F.2d 140 (2 Cir.), *cert. denied*, 337 U.S. 907 (1949); *Park & Tilford, Inc.* v. *Schulte*, 160 F.2d 984 (2 Cir.), *cert. denied*, 332 U.S. 761 (1947).[35] The test's minimum requirement is that the investor have a *right* to acquire a security position (in the case of a purchase) or a *right* to terminate a security position (in the case of a sale) at a fixed and determinable price.[36] Until his right to dispose of shares has thus been fixed, he bears the risk of loss of his entire equity investment; no sale may ever occur; and all questions of profit and loss are wholly problematical. The long-established test of when those prospects are extinguished is an *objective* one, conforming to the section's "mechanical" quality. See *Reliance Electric Co.* v. *Emerson Electric Co., supra*, 404 U.S. at 425; see also *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F. Supp. 962, 967 (S.D.N.Y. 1965).

In *Blau* v. *Ogsbury*, 210 F.2d 426 (2 Cir. 1954), holding that an optionee's "purchase" occurred when an option was exercised, not when it was granted nor when payment pursuant to its exercise was made, the court emphasized that governing precedents had:

> "expressly stated that the time when the alleged insider's rights and obligations became fixed was controlling in the application of the statute. See also 59

35. See also the opinion issued by the General Counsel for the Commission, SEC Securities Exchange Act Release No. 116 (March 9, 1935); Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 401-02 (1953) (beneficial ownership).

36. No case has deviated from this principle. See, *e.g.*, *Booth* v. *Varian Associates*, 334 F.2d 1 (1 Cir. 1964), *cert. denied*, 302 U.S. 892 (1965).

> Yale L.J. 510, 520; 65 Harv. L. Rev. 997." 210 F.2d at 427,

and continuing, it isolated the *sine qua non* of a "purchase" or "sale" under the statute:

> "What [the insider] needs is *firm assurance* that a fixed quantity can be acquired or disposed of at a fixed price; and his commitments are on that basis." *Id.* (Emphasis added)

In *Silverman* v. *Landa*, 306 F.2d 422 (2 Cir. 1962), *aff'g*, 200 F. Supp. 193 (S.D.N.Y. 1961), the Second Circuit specifically held that the grant of an option was not a "sale" of equity securities. There a director granted three options. Two (like the option here) were "calls," each giving the optionee a one-year right to purchase 500 shares at a specified price from the defendant, and the other was a "put" on 500 shares. The defendant received $2,000 (a 16.4% premium) for each call and $1,000 (an 8.2% premium) for the put, the exercise price in each case being $24⅜. Plaintiff argued, as does petitioner here, that the grant of the options constituted matched purchases and sales or "contracts" to do so under § 3(a)(13) of the Act and that therefore the director had "realized" $4 per share on the call and $2 per share on the put. After restating the principles set forth in the prior cases, the court of appeals said:

> "Plaintiff misconceives the nature of an option. By its nature, the option is one-sided; it fixes the *obligations*, but not the *rights*, of the issuer. Landa cannot be said to have 'sold' or 'purchased' Fruehauf stock; . . . *most importantly, any change would occur at the pleasure of the optionee.* Only if both the options had been exercised within their first six months would there have been a 'sale and purchase' of the underlying security within the reach of § 16(b)." 306 F.2d at 424 (Emphasis added).

Rejecting the arguments of both the Commission and the plaintiff, who put forward an incorrect interpretation of *Blau* v. *Ogsbury, supra,*[37] the court reemphasized that a chargeable disposition must include a firm right to sell, pointing out that in *Ogsbury,*

> "the insider was the *optionee;* his exercise of the option fixed his position as to the underlying security, thus acting as a 'purchase.' And here, as we have pointed out, *the insider-optionor's position in the underlying security is not fixed when he sells the option, but when the option is exercised and the underlying security changes hands.*" 306 F.2d at 424-425 n.4) (Emphasis added to emphasis in original).

Answering the plaintiff's additional contention that the grant of a call option was a short sale of securities prohibited by § 16(c), the court said:

> "Here again our holding that a *call-option is not a sale of the underlying security demolishes the plaintiff's contention.*" 306 F.2d at 425 (Emphasis added).

Petitioner makes no mention of these established principles but instead plays upon (P. Br. 13, 15, 16, 17) the "dictionary" characterization which Judge Friendly used to set the grant of an option apart from the "contextual" sense of § 3(a)(14), which has uniformly been recognized as requiring a bilateral contract of sale. This strained semantic argument has long since been rejected:

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37. The Commission argued that since in *Blau* v. *Ogsbury, supra,* the defendant was held to have purchased when by exercising the option he became *obligated* to do so, the defendant Landa should be held to have purchased and sold when he incurred an obligation to offer to do so, arguing that *Ogsbury* was therefore "dispositive of the question." Brief for SEC as Amicus Curiae 12. It was to this argument that the statement quoted by petitioner (P. Br. 16n.) was directed. The error in the argument, as the court pointed out, was its failure to add that Ogsbury, as the option *holder,* already had the *right* to purchase the securities when he, by exercising the option, also became obligated to do so. By exercise *both* his rights and obligations became fixed.

> "[T]he issuer of the options has contracted to purchase and sell the underlying securities, but only when, as and if the option is exercised. . . . they were nothing more than irrevocable *offers* for one year to buy and sell. . . . It is only by an involved process of semantics that these two options can be considered a 'purchase' and 'sale' contemplated by § 16(b). . . . each is conditioned upon an exercise within the time limitation plus the possibility that they would expire without being exercised. To us the 'context otherwise requires.'" *Silverman* v. *Landa*, 200 F. Supp. 193 at 196 (Emphasis original).[38]

This objective test for determining whether and when a sale occurs has been the exclusive interpretation of § 16(b), and "Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made. . . ." *Blau* v. *Lehman, supra*, 368 U.S. at 413; accord, *Reliance Electric Co.* v. *Emerson Electric Co., supra*, 404 U.S. at 427-28. The result in *Silverman* v. *Landa, supra*, was reported to Congress by the Commission under § 23(b) of the Act, 28 SEC ANN. REP. 128 (1962), and Congress, which could if it wished add to the kinds of transactions subject to this extraordinary recovery mechanism, has shown no inclination to do so.

These decisions correspond with the administrative application of the statute, see *Reliance Electric Co.* v. *Emerson Electric Co., supra*, 404 U.S. at 426; *Blau* v. *Lehman, supra*, 368 U.S. at 413. At the time of these events Rule 16a-6, 17 C.F.R. § 240.16a-6 (1961), did not require the grantor of an option to report the grant under § 16(a), but concerned only trading in option rights by their holders.

38. See *Shaw* v. *Dreyfus, supra*, 172 F.2d at 142, where, referring to warrants (options) issued by the corporation, the court said: "The rights were not themselves a contract to acquire shares; they were mere offers by the corporation, which the offeree by acceptance could convert into contracts to purchase; but unless he did so, they remained *mere offers*." (Emphasis added).

Rule 16a-6 was originally numbered as Rule X-16A-1(h),[39] and the Commission's official release explaining the rule stated: "The new rule X-16A-1 requires the holders of options, puts, calls, spreads and straddles to file the reports required by Section 16(a)."[40] In the same agency year the Commission exercised its exemptive power under § 16 by adoption of Rule X-16A-10, which exempts from § 16(b) transactions which need not be reported under § 16(a), stating, "Section 16(b) liability should not be predicated upon any transactions which are not subject to the reporting requirements of Section 16(a)."[41] Pursuant to § 23(b) the Commission reported the adoption of both rules to Congress:

> "Rule X-16A-1 was amended to require holders of options, puts, calls, spreads and straddles to file the reports required by Section 16(a). . . . Rule X-16A-10 was adopted in order to exempt from Section 16(b) those transactions which need not be reported pursuant to the requirements of Section 16(a)." 19 SEC ANN. REP. 45 (1953).

In 1972 the Commission revised Rule 16a-6 to "require the reporting of certain additional transactions"[42] and for the first time made the grant of an option a reportable event[43]

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39. The repositioning of Rule X-16A-1(h) as Rule 16a-6 was in connection with the revisions of Forms 3 and 4 and was described by the Commission as "largely technical in nature." SEC Securities Exchange Act Release No. 6435 (Dec. 12, 1960).

40. SEC Securities Exchange Act Release No. 4754 (Sept. 24, 1952).

41. SEC Securities Exchange Act Release No. 4801 (Feb. 20, 1953).

42. SEC Securities Exchange Act Release No. 9499 (Feb. 23, 1972).

43. Even transactions reportable under § 16(a) are not thereby chargeable under § 16(b). As the Commission stated in its release accompanying the revision of Rule 16a-6, "Reporting changes in beneficial ownership . . . does not necessarily mean that liability will result therefrom under Section 16(b) of the Act." *Id.* "It is recog-

(viz: "The *granting*, acquisition or disposition. . . ."), but only if the option is presently exercisable (. . . of any presently exercisable put, call, option [etc.] . . ."), 37 Fed. Reg. 4329 (1972) (emphasis added). The revised rule further states, "[I]f any such right or obligation is not initially exercisable, the granting and acquisition thereof shall be reported in a statement filed for the month in which it became exercisable." *Id.* Thus, under the rule then in effect Occidental was not required to report its grant of an option, and even under the revised rule no reportable event would have occurred until December 11, 1967, more than the statutory six months after *both* Occidental's most recent purchase of shares and the grant of the option.[44]

Petitioner ignores these established principles and instead takes language from unrelated contexts, including that in *Ferraiolo* v. *Newman*, 259 F.2d 342, 345 (6 Cir. 1958), *cert. denied*, 359 U.S. 927 (1959) (P. Br. 16), which articulates the "pragmatic" or "possibility of abuse" test, under which courts have refused to impose liability where the law's purpose could not be served, to avoid the inequitable, if not unconstitutional,[45] result of "purposeless harshness."

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nized that many reports are required by Section 16(a) of transactions which are not subjected to Section 16(b) liability." SEC Securities Exchange Act Release No. 4801 (Feb. 20, 1953). The test under § 16(a) is beneficial ownership, which is broader than the purchase and sale test of § 16(b). See, *e.g.*, *Newmark* v. *RKO General, Inc.*, 425 F.2d 348, 356 (2 Cir.), *cert. denied*, 400 U.S. 854 (1970); 2 L. Loss, Securities Regulation 1100 (2d ed. 1961), since § 16(a) serves additional purposes. See, *e.g.*, H.R. Rep. No. 138, 73rd Cong., 2d Sess. 13 (1934).

44. In fact no report would have been required in this case under either rule since the option was on the unregistered Tenneco shares, which were not subject to § 16.

45. Due process objections to § 16(b)'s taking of property without proof of wrongdoing have been overcome on the basis that Congress could, based upon the legislative factfinding which preceded § 16(b)'s passage, act broadly against transactions exhibiting a "tendency to evil" and even ban them altogether. *Smolowe* v. *Delendo Corp.*, *supra*, 187 F.2d at 60. If the transactions involved do

See *Blau* v. *Max Factor & Co., supra,* 342 F.2d at 307. But in all such cases the event in question was an actual exchange of shares by the insider, and such acquisition or disposition by him fell within the literal boundaries of the Act, *Petteys* v. *Butler,* 367 F.2d 528, 533, 538 (8 Cir. 1966), *cert. denied,* 385 U.S. 1006 (1967), arguably triggering the statute under the established test. None of these cases has expanded the statute to include nonsale events or suggested it should be done, and *Silverman* v. *Landa, supra,* so held. The district court stated:

> "Here Landa undoubtedly received a substantial consideration for the giving of the options. But they were nothing more than irrevocable *offers* for one year to buy and sell." 200 F. Supp. at 196 (Emphasis in original).

And the Second Circuit in affirming stated:

> "[T]he statute did not intend to penalize *every* speculative transaction; otherwise it would not have *categorically limited* its impact to purchases and sales within six months. Merely because the options may have been entered into for a speculative purpose, it does not follow that they constitute purchases and sales of the types that were penalized." 306 F.2d at 425 (Emphasis added to emphasis in original).[46]

The *Reliance Electric* decision also rejects petitioner's expansive argument. The Court rejected the contention that Emerson's "second sale" should be deemed to have occurred at the time of its first sale, see 404 U.S. at 432, although it

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not carry such a "tendency to evil," this basis of constitutional support is eroded. The "pragmatic" test and this constitutional basis would appear to be similar if not identical.

46. The *Silverman* decision followed *Ferraiolo* v. *Newman, supra,* and *Blau* v. *Lehman, supra,* in which the Second Circuit cited *Ferraiolo* and noted that there was "no rule of thumb" for unusual exchanges, 286 F.2d at 786.

did not occur then but 13 days later. Here petitioner argues that Occidental should be "deemed" to have sold at the time the option was granted, even though Occidental did not do so and acquired no right to do so, and the sale occurred fully 6 months and 10 days later, when the investment trust chose to exercise the option. In addition, as the dissenting opinion in *Reliance* points out, the statute distinguishes between selling within 6 months of a purchase but shortly after 10% beneficial ownership has ceased, as was the case there (since the presumed knowledge which motivates the first sale would be equally relevant to the second), and, on the other hand, holding shares at risk for 6 months into a period where the statute curtails any presumption that the "useful life" of inside information is sufficient to protect against adverse market risks, as was the case here. 404 U.S. at 442.

Moreover, in *Reliance* the Court stated that a "plan" to sell conceived within 6 months of purchase clearly could not be a basis for liability. 404 U.S. at 423. The grantor of an option is in a worse speculative position than an investor who has concretely conceived a plan to sell. The latter could abandon his plan, while an option grantor cannot free himself of the encumbrance placed on his stock even if market conditions make that position unfavorable. The principles applied in both the majority and minority opinions in the *Reliance* case are wholly inconsistent with petitioner's position here.

Unable to distinguish the holding in *Reliance*, petitioner seizes upon the Court's footnote reference to *Bershad* v. *McDonough, supra,* and its truncated form of citation appropriate in such reference. 404 U.S. at 424 n.4. It suggests that the Court gave approval to a theory that the grantor of an option "sells" shares by writing an option, contrary to existing law, when the courts of appeals had not yet begun to grapple with the arguable idea that the acqui-

sition of a *right* to purchase or sell alone might trigger the Act, a question noted but reserved in the opinion below (16A). We think no such approval was given, for even the *Bershad* decision clearly did not so hold.[47]

In fact petitioner does not appear seriously to contend that an optionor disposes of stock in granting an option but rather argues that the receipt of a premium triggers § 16(b) liability, claiming incorrectly that the premium constitutes or "maximizes" profit. Because petitioner admits that its theory does not require that there ever be a sale of shares (P. Br. 15, 22), much less a sale within 6 months of a purchase, it is manifestly outside the terms of § 16(b). In both the *Reliance Electric* case and *Blau* v. *Lehman, supra,* the court refused to broaden § 16(b) despite "persuasive" and logical arguments to the contrary. 404 U.S. at 424; 368 U.S. at 411. In contrast petitioner's argument to expand the statute is specious, rests upon false notions as to options, and conflicts with the logic of the statute itself.

The grant of a call option does not "maximize" profit; to the contrary, it *limits* but does not insure any profit. The grantor has no right to "put" the stock to the optionee and fully retains the risk of loss on the shares. If he holds the stock his risk exposure is the entire value of the stock. If

47. The court in *Bershad* specifically removed itself from what it thought was a "pragmatic"-"objective" debate and stressed its intention solely to examine the "commercial substance of the agreement," 428 F.2d at 697 & n.5, exactly as the court below did. The opinion turned to a discussion of options, and then, as one commentary put it, "the court did something of an about-face, holding that the agreement in fact did not involve an option, but instead involved a present sale of McDonough's stock. . . . One noteworthy aspect is that the court confined its holdings to the facts of the case rather than enunciating any rules of general application to options." Gadsby & Treadway, *Recent Developments Under Section 16(b) of the Securities Act of 1934,* 17 N.Y.L. FORUM 687, 704-705 (1971); see Note, *Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?, supra* note 33, at 926. The facts of the *Bershad* case, which involved no true option, are treated in detail *infra* at pp. 44-47.

he does not own stock he can write an option "short," in which case he may be required to buy stock in a rising market to deliver it under the option, and his risk exposure is indeterminate.[48] The grantor limits his possible gains, because the only consideration which the option gives him is the premium, and this is not "profit," for the question of profit turns on later events. His potential losses are not similarly limited. In addition to his downside risk, the grantor loses as the price of the stock increases above the option's exercise price, and he suffers a loss on the transaction if the price increases beyond the premium received. As stated by Professors Jennings and Marsh, commenting upon *Silverman* v. *Landa, supra*:

> "The writing of a put, call or straddle has exactly the opposite economic effect as the acquisition of one. The writer of an option has not improved his economic position for speculation, but has worsened it (for which naturally he charges a price)."[49]

In arguing that the grant of an option gives or "assures" profit, petitioner simply ignores the concurrent encumbrance on the grantor's shares, arguing as if the grantor had received the premium with no continuing obligation to deliver stock upon call, thus treating the premium as "free money," which is patently incorrect.

Petitioner's entirely unexplained assertion, that a statutory insider can advantage himself in granting an option, would presumably be based upon the premise that he could foresee that there would be no increase in the value of the stock during the term of the option larger than the premium received, and that he would assume the risks

48. In the case of an option written "short" the maintenance of 30% of current market value in a margin account is required. See Federal Reserve Board Reg. T, 12 C.F.R. § 220.122 (1972).

49. R. JENNINGS & H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS 1076 (2d. ed. 1968) (Emphasis added).

of the option just to gain *some* of the premium.[50] Because option premiums are calculated as a relatively small percentage of the current price of the underlying stock—an average of 10 to 14% based on market experience—the price movement necessary to defeat the investor's objective is equally small.[51] And, because the option in this case was exercisable only *after 6 months,* the basis of petitioner's argument conflicts with the scope of § 16(b). Just as an insider's information is presumed to be sufficient to profit in short-term price conditions, that presumption is *absolutely* withdrawn when the hypothesized advantage depends upon a projection by the insider of price conditions more than 6 months ahead. *Silverman* v. *Landa, supra,* 306 F.2d at 425; see *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 442 (*dissenting opinion*); *Blau* v. *Max Factor & Co., supra,* 342 F.2d at 308; see also *Booth* v. *Varian Associates, supra,* 334 F.2d at 4; Note, *Put and Call Options Under Section 16 of the Securities Exchange Act,* 69 YALE L. J. 868, 875 (1960) (6 month limitation as to optionees).

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50. Note that even in the foregoing situation the amount of the premium will still not be "assured" profit, since in the event of any increase in the price of the stock the grantor will effectively be deprived of part of the premium received. In addition, Occidental agreed to hold the Kern shares for the term of the option and could not "dump" its shares in the event of a price decline, and thus bore the downside risk also. Here, any decline in the value of the shares would also eradicate the premium pro tanto.

51. See D. VAUGHN, SURVEY OF INVESTMENTS 41 (1967) ("the cost of a six month contract is approximately 12 percent of the market price of the stock"); W. J. EITEMAN, C. A. DICE & D. K. EITEMAN, THE STOCK MARKET 316-17 (4th ed. 1966) ("premiums paid by buyers of six-month calls amount to about 14 percent of the value of the stock. The percentage premium on low-price stocks would probably run somewhat above this, and the percentage premium on high-priced stocks would probably run slightly below"); SEC, REPORT ON PUT AND CALL OPTIONS 84, 85 (1961). (Six-month calls were approximately 12 percent of the current market price; premiums of one-year calls approximately 164.8% of the premiums of six-month calls.)

Whatever hypothetical informational advantage concerning the issuer § 16(b) may attribute to him, the statutory insider remains at the real risk of numerous unpredictable outside factors[52] which have direct impact upon both the value of a security and the willingness of any potential investor (including Tenneco and the LR Fixed Investment Trust) to commit funds to *any* security. Petitioner must in effect argue that 6 months is too short a period to nullify an insider's hypothetical advantage. Nevertheless that is precisely the line the statute draws. *Adler* v. *Klawans, supra,* 267 F.2d at 845. Under § 16(b) all periods of 6 months or more are the same. *Id.*

In *Silverman* v. *Landa, supra,* the court went on to address the very argument petitioner makes here. Plaintiff argued that inside information suggesting that the price of the underlying stock would remain relatively stable would enable the director to insure himself of substantially all of the 16.4% call premium (petitioner's argument here) *and* the 8.2% put premium (a combined 24.6% premium) while retaining his shares at full value. The court held such a theory to be:

> "a proposition *contrary to the statute itself,* which assumes that, after six months, the likelihood of profits from inside information is too remote to warrant continued restriction in the free play of market transactions." 306 F.2d at 425 (Emphasis added).

Thus petitioner's prime "example,"[53] relied upon to support the imposition of liability here (P. Br. 19), prohibits

52. An incomplete sampling of such factors would include the President's health, inflation, recession, wars, peace, international monetary conditions, federal reserve policy, interest rates, government spending, consumer outlays, trade deficits, etc.

53. Petitioner asserts that, when the option first became exercisable *(more than 6 months from the date of grant)*, the market for the Tenneco shares was 93½-95½, and therefore Occidental might

the imposition of liability, because it violates the statutory 6 month rule. In contrast, Judge Friendly's simple and straightforward description of Occidental's risks (14A-15A, 16A) corresponds exactly with the scope of the statute, its underlying assumptions, and governing precedent.

Even this complicated hypothetical abuse, which rests on assumptions contrary to § 16(b), has nothing to do with whether the grantor of an option has recently purchased shares nor with any increase in value which may have occurred since their purchase. Petitioner's argument deliberately confuses a paper increase in the value of the stock as of the date of grant—which, if it exists then, does so whether or not an option is granted and is not realized by the grant—with the effect of the option grant itself. Even if an option grant should turn out to be profitable, the amount of profit attributable to the grant can be no greater than the premium received; thus it has nothing to do with the past purchase price of the stock, and it turns solely on market conditions prevailing *after* the option is granted, not on conditions between the time of a prior purchase of shares and the time of grant. Moreover, the option has the same potential for limited profit or greater possible loss whether the underlying stock has been held for 2 months or 2 years. Indeed the grantor need not even own any stock to write the option. Thus, although petitioner purports to distinguish *Silverman* v. *Landa*, *supra*, on the basis that there was no recent purchase of stock (P. Br.

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have realized only $10.50 per share if it had not *(more than 6 months before)* granted an option at $10 per share (P. Br. 19)—thus arguing from hindsight while violating the statutory limits of presumed foresight. The same erroneous argument is repeated in essence (P. Br. 22) in the assertion that the option "would give it [respondent] a profit of nearly $18 million if the option were exercised, and nearly $9 million even if it were not," which is also inaccurate, since if the merger did not occur Occidental would not even keep the premium, and the underlying investment was exposed to market decline.

16), this is plainly irrelevant under its own theory.[54] See also *Blau* v. *Lamb, supra,* 363 F.2d at 522 n.22.

For the holder, an option "greatly magnifies the opportunity for profit in relation to the amount of the investment," 2 L. Loss, *supra* note 43, at 1077; but for the grantor, the option greatly reduces the opportunity for profit in relation to both the investment and risk assumed. The grant of an option simply bears no resemblance to "the class of transactions in which the possibility of abuse was believed to be intolerably great," see *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 422, and to which the statute was "categorically limited," *Silverman* v. *Landa, supra,* 306 F.2d at 425.[55]

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54. Note that although petitioner focuses the whole of its "as a matter of law" argument on receipt of a premium as an alleged instrument of § 16(b) profits, it switches in a footnote (P. Br. 22n.) to the quite different theory that the underlying stock was sold, and claims it is entitled not merely to the premium but to any increment in the value of the underlying stock as of the date of grant, giving no reason, but citing *Bershad* v. *McDonough, supra,* and *Blau* v. *Allen,* 163 F. Supp. 702 (S.D.N.Y. 1958). These cases afford petitioner no support, but hold merely that a sale will not escape liability merely because it is labeled or, as in the *Allen* case, is retroactively alleged to be, an option. In the *Allen* case the sales contract called for a total payment of $22 million with three installments of 2, 10 and 10 million dollars, and *any* payments made were to be treated as "liquidated damages" if final payment were not made, 163 F. Supp. at 705. Both cases involve a plain purchase and sale, all proceeds of which are chargeable.

55. Petitioner also rests heavily on its *ipse dixit* assertions that a statutory insider who writes an option is "far more likely to profit [than] suffer a loss" (P. Br. 14) and that "in the overwhelming number of instances" it will be profitable (P. Br. 21). These assertions are not only irrelevant, since they pay no attention to the scope of § 16(b), they are also bereft of support. The most extensive statistical survey on option trading found no instances of insider grants of options during the entire survey period, REPORT ON PUT AND CALL OPTIONS, *supra* note 51, at 56 (the "REPORT"), and confirmed that option writing appealed primarily to large investors seeking a relatively small current income through the sale of a sufficient number of options to compensate for losses on some and profits on others; see Note, *Put and Call Options under Section 16 of the Securities Exchange Act, supra,* 69 YALE L. J. at 894, which also recog-

Thus the court below correctly applied the "possibility of abuse" test to the grant of an option and correctly found that it was no "sale." It refused to create a fiction that a grant realizes or guarantees profit, to ignore the encumbrance placed upon the grantor, and to disregard the consistent interpretation and scope of the statute. Each of petitioner's attacks on the opinion below suffers from one or more of its own errors.

For example, petitioner argues that it should recover even though the option was reasonably priced, since a reasonable "sale" price would be no defense under § 16(b) (P. Br. 20). This argument simply begs the question by ignoring all differences between the risk-bearing grant of an option and a risk-ending sale of shares, arguing as if a sale had been established under § 16(b).

Petitioner attacks the court's recognition that the premium here would have to be refunded if for any reason the merger did not occur or was delayed, by pointing out that Kern and Tenneco opted to close the merger within 6 months. It *fails to add* that when, if at all, the merger might occur was one *additional* contingency out of Occidental's hands, and that the removal of that contingency merely enabled Occidental to retain the premium, which any other optionor would always have the right to retain, but it created no sale, which still depended upon the future market conditions and the judgment of the optionee, in light of those conditions, whether to call the stock.

Petitioner attacks the court's recognition that the option would undoubtedly lapse unexercised if the market turned sour during the more than 6 to 13 month period before the

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nizes that the grant of an option is not covered by § 16(b). *Id.* at 893-94. The REPORT noted that holders of options, in contrast to grantors, must report under § 16(a). *Compare* REPORT 75 with *id.* 56; see text at pp. 30-32, *supra*. Thus insiders apparently had not availed themselves of this not-very-advantageous opportunity even when they could do so without publicity.

option might first become exercisable (14A)[56] by countering that Occidental would retain the premium (P. Br. 21), but it *fails to add* that Occidental would also incur a multimillion dollar loss precisely because the shares allegedly "sold" had not been sold. Petitioner accepts the court's recognition that the grantor limits the speculative potential of his share ownership but says that a "sale" also limits such potential, *failing to add* that a sale also ends risk, which is precisely what sets it apart from an option. Here Occidental was both prevented from participating in price increases—which did occur during the term of the option[57] —and yet also bore the investment risk.

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56. Judge Friendly noted that the Tenneco preference stock might have a downside risk of $75 per share, which was reasonable in light of the fact that the preference stock had an ultimate equity base of 3.6 shares of Tenneco common stock, which had in the prior nine month period traded as low as 19⅛ and 20⅞ (492a, Ex. A at 6) and the difference between the preferred shares' proposed dividend and the expectable dividend on the related amount of Tenneco's common was just over $1 (*Id.* 5-6). In fact, during the course of this litigation the Tenneco preference shares showed they could drop at least as low as 66½. STANDARD & POOR'S, ISL DAILY STOCK PRICE INDEX, vol. 2 at 328 (1970) (May 26, 27, 1970). Dow Jones Industrial Average was approximately 660, *id.* at ix.

57. On the first trading day after the Kern-Tenneco merger was announced, the Kern shares rose to 94¼, closing at 93. (See 492a, Ex. A at 6.) In June and July, before the merger closing, Kern shares closed as high as 96⅜ (July 12) and as low as 88¼ (June 15). On September 13 Kern shares (still listed for trading) traded as high as 106¾, while the Tenneco common stock also reached a peak of 32¼. Other shareholders could realize this short-term gain, but because of the option Occidental could not, entirely without regard to § 16(b). During November the Tenneco preference stock again dropped and was bid at 92 (Nov. 21) but in the last trading week before the option was exercised rose again to 95-97 (Dec. 5) and, at the close of the day during which the option was exercised, December 11, was quoted at 93½-95½. Sources of quotations: Kern shares: STANDARD & POOR'S, ISL DAILY STOCK PRICE INDEX, vol. 2 at 175; vol. 3 at 176 (1967). Tenneco common stock: *Id.*, vol. 3 at 300. Tenneco Preference Stock: Wall St. J., Nov. 22, 1967, at 29, col. 6; *Id.*, Dec. 6, 1967, at 29, col. 6; *Id.*, Dec. 12, 1967, at 29, col. 6. National Quotation Bureau, Inc. reports that on Sept. 13 Tenneco preferred shares were quoted at 106½-107½ and on Dec. 11 at 94½-96½. During the same period the Dow Jones Industrial Average had advanced from approximately 870 in the June-July period, to 923 on Sept. 13, closing at 881 on the day during which the option was exercised. STANDARD & POOR'S, *supra*, vol. 2 at ix; vol. 3 at ix.

Petitioner's position is based upon the idea that any transaction with an "opportunity to profit [or lose]" is a "sale" (P. Br. 14, 21-22), which is entirely incorrect. Indeed, a purchase standing alone creates such an opportunity, depending on later events. But only a transaction in which the investor *disposes* of his investment is a sale, as the literal language of § 3(a)(14)—"otherwise *dispose* of" —clearly requires, *ejusdem generis,* no matter how broadly read. To achieve the windfall recovery which it seeks without proof of wrongdoing, petitioner must show a conclusive, dispositive act within six months of a purchase of shares. The grant of an option is an inconclusive, nondispositive act, the inherent risks of which are both apparent and judicially recognized, and accordingly has been held to be outside the purpose and scope of § 16(b). Petitioner thus relies in error upon *Gratz* v. *Claughton,* 187 F.2d 46 (2 Cir.), *cert. denied,* 341 U.S. 920 (1951), and *Smolowe* v. *Delendo Corp., supra.* Both cases deal with separate combinations of purchases and sales during the statutory period, not with a single transaction which itself is not a purchase or sale, and which does not end risk but leaves questions of profit and loss to long-term conditions. Both cases set down "thoroughgoing" rules of profit computation *after* purchases and sales are proved, but cannot be used by petitioner as bootstraps to supply the missing elements of liability.

B. There was no basis for finding that the option was a "sale in fact."

Petitioner's claim that the decision below requires "ad hoc" inquiry into an investor's " 'intent' " (P. Br. 23) virtually inverts both the holding below and this Court's decision in the *Reliance* case, since neither decision invites any such inquiry. The court below held that, unless an investor

acquires at least a *right* to dispose of shares within six months of a purchase, § 16(b) has no application. The test under which the court below would impose liability despite the apparent absence of such a right distinguishes between transactions, not "intents," and correctly focuses on the commercial substance of the agreement to determine what in fact was done:

> "When the down payment is so large in relation to the purchase price that exercise is practically compelled or the price is below any reasonable expectation of the value of the security at the end of the option period . . .

then

> . . . a court might find that in truth and fact a sale had occurred when the 'option' was granted." (14A)

This test articulated by Judge Friendly emerged from a full understanding of the factors which led to the result in *Bershad* v. *McDonough, supra.*

In *Bershad* the defendant McDonough (and his wife) bought 282,726 shares of the common stock of Cudahy Corporation ("Cudahy") in the liquidation of the estate of Edward Cudahy at $6.75 per share. As this was a controlling block, McDonough and two associates were elected directors. Within 4 months McDonough entered into a so-called "option" with "Smelting" covering 272,000 shares at $9 each, pursuant to which he received $350,000, which was not returnable in any event and would be credited against a total sale price of $2,448,000. The "option" had to be exercised or would expire just over 2 months after grant. At the same time McDonough gave Smelting an irrevocable proxy to vote the shares for that 2 month period. Within two days he and his associates resigned from the board, and three days later the positions were filled by nominees of the buyer, thus passing immediate control. Plaintiff attacked

the agreement, claiming that it was "more than" an option, 300 F. Supp. at 1054. On its motion for summary judgment the district court so found. It was affirmed on the ground that:

> "The circumstances of the transactions clearly indicate that the stock was effectively transferred, for all practical purposes, long before the exercise of the option." 428 F.2d at 698,

the court of appeals stressing that its objective was to expose the "commercial substance" of "sham transactions," *id.* 697. The district court in *Bershad* had noted that "unlike the situation in *Silverman* v. *Landa, supra,* the money paid to the McDonoughs was not a premium," 300 F. Supp. at 1054, and the court of appeals viewed the amount paid as a "significant deterrent to the abandonment of the contemplated sale," 428 F.2d at 698, thus indicating that there was no option in fact involved in that case.

In an option the premium paid does not act as a "deterrent" to nonexercise. Rather it is the option's exercise price which determines exercise in future market conditions. If the effective exercise price of an option is $95, the optionee will decide whether or not to exercise it based upon the desirability of a purchase at $95 in economic conditions prevailing when the option is exercisable, without regard to whether he has previously paid $3 or $20 for the privilege to buy at $95. If, however, the effective exercise price is set significantly below the current market value at the time the option is granted, then the economic balance is radically shifted toward exercise, and it is no longer a true option. That a premium is made creditable against a stated price upon exercise is a matter of form. It merely means that the stated price must be reduced by the amount of the premium in order to determine whether the real exercise price is in reasonable range of current market, or is

well below market and is thus designed to make ultimate sale an economic certainty—a case where, as Judge Friendly stated, the "payment is so large in relation to the purchase price that exercise is practically compelled" (14A). This was exactly the case in *Bershad* v. *McDonough, supra.*

At the time the *Bershad* "option" was granted, Cudahy common closed at 9⅛ on the New York Stock Exchange.[58] The stated option price of $9 per share was itself below market, and because the initial payment of $1.25 per share was creditable against the stated price, the effective exercise price of the so-called "option" was $7.75 per share, substantially (over 15%) below current market. The "commercial substance" was that the alleged optionee had to buy the stock even if, in the *short-term* period after grant, it fell significantly below the market price prevailing at the time of grant. The alleged "optionor" thus had "practically compelled" a sale, creating the economic assurance of a sale in place of the contractual right § 16(b) requires. Smelting had not paid a premium but had made a down payment by purchasing part of the stock's current market value, as the plaintiff there expressly pointed out.[59]

Because the economics of the *Bershad* agreement showed it was not an option in fact, the defendant made no attempt to defend its terms. At oral argument before the Seventh Circuit he first produced a letter purporting to show that

58. Wall St. J., July 21, 1967, at 20, col. 2.

59. Plaintiff in *Bershad* stressed that in *Silverman* the premium was paid "for an option to purchase the stock at the full market value on the date the option was granted. * * * McDonough wanted to make sure that he had the equivalent of a firm sale and did so by asking for the substantial down payment." Memorandum of Law in Opposition to Defendant McDonough's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment, 7-8, 300 F. Supp. 1051 (N.D. Ill. 1969).

the alleged "premium" was reasonable.[60] Plaintiff correctly responded that the size of the premium was not the relevant factor because "the $350,000 was a discount from market price unlike the normal procedure in which the payment for the true option is a premium above the market price."[61] Taking this feature, together with the transfer of virtually all incidents of stock ownership, and the short term of the option itself, the court could clearly find that the stock had in fact been sold. The ground for so finding had been ceded to the *Bershad* court, because McDonough could neither defend the agreement nor advise the court of the functions and risks of true options, because to do so would hurt his case. The case lies precisely within Judge Friendly's test, concerned only a disguised sale, and involved no expansion of § 16(b).

In order for the option here to bear any resemblance to the *Bershad* arrangement, it would have been necessary that the option provide for an effective exercise price of less than $82, an initial payment of over $13 (non-returnable), and a term of 2 months.[62] There is no economic resemblance between the two agreements. The effective exercise price of the option was $95. This was not below current market. The Kern shares were then already trading at prices reflecting the Kern Board's acceptance of the proposed

60. Petition for Rehearing 9. No contemporaneous advice had been sought, and the belated proof was offered as a post facto justification.

61. Answer to Petition for Rehearing 9.

62. Thus, petitioner's assertion that a statutory insider can "fix" the prices of an option (P. Br. 19) is essentially irrelevant, since the question under § 16(b) is not what hypothetical transaction he *could* make, but what transaction he *did* in fact make. Moreover, § 16(b) does not presume that an insider can "fix" the prices of transactions with others, but rather that he can take unfair advantage of existing or future market prices fixed by others. Obviously, even a statutory insider cannot freely fix such prices since he is limited by what the market or bargaining will bear.

exchange for Tenneco preference shares and had reached no higher than 94¾ (492a, Ex. 1 at 6). The returnable premium itself was based on expert advice and comports with published values of premiums (which are not returnable). And setting the premium against Lehman Brothers' projection of what the stock might fairly be worth reflected a reasonable expectation of possible price change, neither guaranteeing exercise nor seeking advantage. It was by no means certain that the market price of the Tenneco preference shares at the distant period when the option might be exercisable would not be well below $95. The option was not short term, unlike the arrangement in *Bershad,* but was exercisable only more than six months from both Occidental's most recent purchase of shares *and* the time of its grant and might become exercisable as late as 13 months after its grant. At such times no one can be held under § 16(b) to predict whether the market would favor, or even permit, exercise by the optionee.

The regulations adopted by the Board of Governors of the Federal Reserve System pursuant to § 23 of the Act, see 35 Fed. Reg. 3280 (1970), to prevent abuses of investment borrowing rules, point out the essential distinction between the spurious "option" in the *Bershad* case and the option here, under the same analysis employed by Judge Friendly. Addressing a so-called "deep in the money" agreement, where the initial payment represents a substantial discount from the stock's current market price, rather than a premium above it, the rule states:

> "(c) The option embodied in the normal put or call is exercisable either at the market price of the security at the time the option is written or some 'points away' from the market. The price of a normal option is modest by comparison with the margin required to take a position.
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> • • • • •

> (f) Turning to the 'deep in the money' [call option] . . . even if the price fell, unlike the situation with a normal option, the buyer would still be virtually certain to exercise his right to purchase before it expired in order to minimize his loss. The result would be that the buyer would not have a genuine choice whether or not to buy. . . ." 12 C.F.R. § 220.122 (1972).[63]

Petitioner's sole objection here is an isolated post-appellate attack on the amount of the premium, but it does not dispute that Davis called the Donaldson firm and was advised that a reasonable premium would be $9 to $12 per share. It merely seeks remand as an afterthought following the decision below to search for an "expert" who might be willing to testify that if he had been retained then he would have approved of a lower premium. Since the amount of the premium has been an integral part of petitioner's case since the district court,[64] and since it did not there or in the court of appeals dispute Occidental's responsive proof as to the basis and origin of the premium,[65] this offer comes too late.[66]

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63. The example under discussion was a 30 day "option" on a stock then selling at $100 to buy it at $70 where the buyer initially paid 30 percent of the stock's market price to the grantor.

64. Brief for Appellee 56; Memorandum of [New Kern] In Support of Its Motion for Summary Judgment in 67 Civ. 4042 (May 7, 1970), at 39.

65. In the district court petitioner both had and exercised an opportunity to dispute Occidental's recital of the record. It submitted reply affidavits disputing only those facts relating to the question of whether Tenneco had agreed to delay the closing of the merger and the circumstances surrounding its closing in violation of the outstanding court order (249a-250a), leaving undisputed in the record both the basis and reasonableness of the premium.

66. Indeed, the proper time to have come forward with other views of a fair premium was at the time the option was negotiated.

Equally important, petitioner's attack on the size of the premium in isolation has no bearing on the § 16(b) issue, as the plaintiff in the *Bershad* case correctly noted, since it did not represent a discount on the current market price. Petitioner appears to argue that, even though any other shareholder could have sold an option at $10 per share (and on better terms), Occidental was required by § 16(b) to take less because of the number of shares subject to the option.[67] The aim of the statute is not that a large shareholder take less, but only that he does not take unfair advantage of inside information. Any person can grant an option and obtain a premium, and because only general knowledge of opportunities available in the market place, not inside information, is necessary to do so, it raises no § 16(b) problem. See *Falco* v. *Donner Foundation, Inc., supra,* 208 F.2d at 604. Section 16(b) is not activated by the grant of an option, and an option exercisable more than 6 months from the date of grant could not in any event be included under the statute. Thus, if the premium alone is alleged to be unfair, which petitioner has denied, the action lies not under § 16(b) but under some other theory of recovery:

> "[S]peculation actual or potential is the only vice within the purview of § 16(b). Other possible abuses of options do not now concern us." *Blau* v. *Ogsbury, supra,* 210 F.2d at 427.[68]

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when an adjustment, if any, would have been a relatively small amount in the premium, not when the stakes have changed to a multimillion dollar claim for § 16(b) damages.

67. This makes little sense. Although a buyer may pay slightly more or less than the current market value for a block of shares at any given time, depending upon whether he finds the block an advantage or disadvantage in economic conditions existing at that time, there is no reason why a potential increase in the price of shares (which is the fair measure of a premium) does not command full value.

68. The analogue of petitioner's argument would be that a purchase and sale separated by more than 6 months is subject to §16(b) if the purchase price were "too low" or the sale price "too high." If there is a cause of action, it is clearly not within § 16(b).

The option here had more than the usual range of contingencies in addition to its long term. Its holder was even less "committed," if at all, to its exercise than the usual optionee. Occidental's right to keep the premium depended not merely upon the merger but upon its consummation before July 31, 1968. If Kern and Tenneco found it undesirable to merge or were forced to delay for any reason, Occidental would have to return the premium.[69] Since the value of the Kern shares had been inflated by merger prospects, Occidental faced the extraordinary risk of a 30% price decline to their pre-merger level if no merger occurred. Nor may it be said that Occidental could then resume its own bid, since that decision would depend upon the future state of the market and financial condition of both Occidental and Kern.

If and when the merger took place was similarly beyond Occidental's control. And after the merger took place Occidental was entitled to retain the premium; thus for the first time it had a reasonable option agreement, but it remained at the risk of the market and at the pleasure of the optionee. Occidental could not take advantage of any short-term increases in the value of Kern or Tenneco shares, which would inure to other shareholders. On the other hand, Occidental fully bore the risk of future market declines, since it could not dispose of its shares during a 6 and prospectively 14 month period.

The facts of this case present another barrier to the application of § 16(b). The statute in terms requires a purchase and sale of shares of the same issuer, but here the option was not granted on the Kern shares but on then nonexistent and unregistered Tenneco shares which Occidental might receive if there were a merger. A claim that Occidental

69. Indeed, under the omnibus clause in the Plan (124a, Ex. D, D24) Kern and Tenneco could delay the merger merely to cause Occidental to repay the premium, although it would not redound to their benefit, since Tenneco Corporation had already sold the option.

can be held under § 16(b) to foretell the *future* market price of the shares subject to the option after it became exercisable requires an inside relationship, statutorily defined, to the issuer of *those* shares.

Thus, even assuming the merger were consummated, the exercise of the option (and profit or loss thereon) turned not on the value of Kern's shares but on the future market value of the Tenneco preference shares. Occidental cannot be held liable on the basis of a *long-term* projection as to the business affairs of a corporation of which it was *not* a statutory insider, about which it cannot be presumed to have had inside information,[70] and on the basis of shareholdings *not* subject to § 16.

Against these long-term risks petitioner amasses an array of irrelevant factors, including the charge that the option agreement was entered to avoid triggering § 16(b). Under § 16(b) it is irrelevant what Occidental may previously have wanted. The question is what it did. *Reliance Electric Co.* v. *Emerson Electric Co., supra,* 404 U.S. at 422. What Occidental did not do is sell its shares.[71]

The other factors which are said to align this case with *Bershad* are not comparable individually, collectively or in context. Occidental did not transfer directorships or control because it was a locked-in disempowered shareholder

70. At the time of the grant of the option Occidental was in no way the "beneficial owner" of then nonexistent Tenneco preference stock which, in addition, was not subject to § 16, and was not convertible into registered Tenneco common stock during the relevant period. No right to the preference shares could accrue until after the merger was approved and all conditions precedent were met. Even when such a right exists, the existence of a right to receive shares in a merger at a future date does not constitute beneficial ownership of such shares for purposes of § 16. Rule X-16a-6a(3), 37 Fed. Reg. 4329 (1972).

71. Petitioner suggests that the option served "none of the economic functions" of an option (P. Br. 24), which is incorrect. It functioned entirely as an option, although the *reasons* for its grant were motivated by respect for the existence of the statute.

and had neither. Occidental's dismissal of the shareholder suits, which petitioner's counsel characterized as "simply proceedings for the inspection of books and records" (112a), was not in consideration for the option, but for the "harmless" favor (Symonds depos. 91) of a brief delay in the registration of the proposed Tenneco stock. Dropping a demand for two directorships where possession of such directorships was nonexistent and not forthcoming is simply of no substance.

Petitioner presses the allegation, first made after the decision below, that Occidental gave its own attorney (Mr. Brown) a revocable proxy, and that Mr. Brown told Mr. Daum he would vote Occidental's shares in favor of the merger, claiming that this should upset the decision below.[72] Petitioner's version of these circumstances has changed since first expressed in its Petition for Rehearing. There petitioner allowed that Occidental "was unwilling to make the proxy a condition of the option agreement" (510a) but has deleted that from its presentation here. Similarly deleted is the claim that the proxy was "intended to be irrevocable," *id.*, which was an attempt to convert it into the irrevocable proxy in *Bershad*, which, in addition, was not a proxy of limited purpose but gave general corporate power. The facts are that Mr. Symonds did not bargain for nor did he know of any discussion of how Occidental might vote its shares (60a); Tenneco conceded that the option was not conditioned upon Occidental's neutrality or support (366a); and Occidental did not vote for the merger (81a). Even

72. Here again petitioner's failure to press any such claim in the two courts through which it has passed cannot be excused. Petitioner's attempt to attribute this to a lack of discovery (P. Br. 7n.) is absurd. It had no need to discover facts of which its own counsel claims to have had personal knowledge; Occidental's revocable proxy to its own attorney was in fact elicited in discovery (Davis depos. 41, 79), and petitioner's failure previously to mention any proxy merely indicates its own prior and correct view that the matter was of no importance (82a).

wholly crediting petitioner's latest version *arguendo,* the revocable proxy was revoked and exchanged merely for a letter which fairly explained why Occidental had decided not to oppose the merger pointlessly.

These new claims have no significance, since the necessary bases for liability under § 16(b) were wholly lacking here. In *Bershad* the court was confronted with a short-term spurious "option" which practically compelled a sale. The concurrent passage of actual control[73] strongly reinforced a basic case of liability, and it was only upon such an unusual combination of factors that the court predicated liability. 428 F.2d at 698. But the fundamental fact of the instant case is that every act undertaken by Kern's management, and successfully so, had the specific purpose of nullifying the attributes usually ascribed to the share ownership which Occidental had acquired. Yet it is on the success of that very strategy that petitioner would impose liability. Petitioner's belated offer of proof, if credited, could only show that the proposed merger did not face senseless opposition by Occidental, and its contention makes the result turn on whether Occidental had instead manufactured actual or symbolic obstacles to the merger.

Petitioner's attempt to divert attention from the long-term risks of the option is belied by its own statement to shareholders, while the option was outstanding, that it was uncertain whether it would exercise it even if the merger occurred (492a, Ex. 1, at 3). The refusal of the court below to be drawn into an inquiry which was not merely "ad hoc" but irrelevant was entirely correct.

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73. In *Bershad* the value of McDonough's shares lay in their capacity to transfer control to Smelting, 300 F. Supp. at 1055, and the passage of that control—virtually all the incidents of ownership—with the option agreement was explainable only on grounds that the stock had in effect been sold. Here Occidental could not give Tenneco control of Kern; but Kern could, and it had effectively done so entirely without regard to Occidental before any discussions between Tenneco and Occidental ever occurred.

POINT II

Kern's and Tenneco's merger was not Occidental's sale.

The initial question presented here is whether a hostile corporation and its chosen merger partner may cause a merger and then extract a windfall recovery by labeling their own acts a "sale" by respondent, even though respondent did not sell or exchange any shares within 6 months of purchase as § 16(b) requires.

Here the Court need not reach the inquiry made in the "pragmatic" cases, for in all such cases the defendant either exchanged shares, by exercising an option to convert or otherwise, or controlled the exchange.[74] His exchange of shares arguably triggered the statute, and this in turn called for a "possibility of abuse" inquiry. Compare *Petteys* v. *Butler, supra,* 367 F.2d at 537. But in this case the elements of liability prescribed by the statute are lacking. We also show herein that the event alleged to be a sale gave no opportunity for the unfair use of inside information under the "possibility of abuse" test. Both approaches yield the same result.

Petitioner specifies no act of "sale" by Occidental. Its recital of the "facts underlying the exchange" (P. Br. 26) consists solely of an account of Kern and Tenneco carrying

74. *Newmark* v. *RKO General, Inc., supra,* 425 F.2d 348; *Petteys* v. *Butler, supra,* 367 F.2d 528; *Blau* v. *Lamb, supra,* 363 F.2d 507; *Blau* v. *Max Factor & Co., supra,* 342 F.2d 304; *Ferraiolo* v. *Newman, supra,* 259 F.2d 342; *Gold* v. *Scurlock,* 324 F. Supp. 1211 (E.D. Va. 1971), *appeal pending,* No. 71-2180-82, 4 Cir; see text at note 107, *infra.* Note that in conversion cases the investor always carries out a deliberate exchange, thus arguably triggering the Act. The inquiry in such cases focuses upon whether the conversion was "forced" by a call for redemption beyond the investor's control, and even if not so forced, whether the exchange causes a relevant change in the investor's equity investment. See *Blau* v. *Lamb, supra,* 363 F.2d at 518n.15.

out a merger. It goes on to say that, "[a]side from differing income tax consequences," the "net effect" is just as if Occidental sold Kern stock and bought Tenneco stock (P. Br. 27)—transactions that never occurred. It should have said "aside from differing §16(b) consequences," since §16(b) is not concerned with the "net effects" of others' acts but with specific acts by specified persons that trigger liability in a mechanical fashion. "[I]t can hardly be said that failure to sell is tantamount to a purchase"—even though the "net effect" is just the same as a sale and repurchase. *Ferraiolo* v. *Newman, supra,* 259 F.2d at 346.

Petitioner conceded below that Occidental had no alternative to accepting the results of Kern's and Tenneco's merger:

> "It is true that the transaction was so cast that, once approved, defendant had no alternative, such as appraisal rights, to accepting its results. Further, defendant's over 20% ownership of Old Kern would not, of itself, have sufficed to secure or prevent approval of the exchange." [75]

Since the merger was not controlled or engineered by Occidental; since it could not block the merger, which was compelled by the overwhelming vote of Tenneco and Kern shareholders; since whether and when the merger would occur lay with Tenneco and Kern; and since Occidental's investment was altered merely by the operation of California law, there is no basis for calling the merger of Kern and Tenneco a "sale by Occidental." No issue under §16(b) arises, and the Court need go no further.

No authority cited by petitioner meets this issue with the single exception of *Shaw* v. *Dreyfus, supra,* which supports respondent and states that §16(b) "purchases" and "sales"

75. Memorandum of [New Kern] in Support of Its Motion for Summary Judgment in 67 Civ. 4042 (May 7, 1970) at 25-26.

are transactions occurring "by one's own act." 172 F.2d at 142.[76] It has no colorable support even in the reputedly strict dictum of *Park & Tilford, Inc.* v. *Schulte, supra,* since Judge Clark there made plain that he was considering only an exchange made in fact by the defendants, and which was entirely subject to the defendants' control,[77] and he later expressly reemphasized both these qualifications. *Roberts* v. *Eaton, supra,* 212 F.2d at 83, 85.

Likewise the cases arising under § 10 of the Act, relied on by respondent, instead support Occidental.[78] They hold that where a shareholder's investment is altered in a merger, the choiceless nature of the transaction may not be turned *against him* by those who procure the merger. Here those who procured the merger seek to turn it against Occidental. Moreover, §16(b)'s definitional problems cannot be solved by such cases, which "involved different facts and different statutes, statutes which themselves have different language, purposes, and history from the statute here." See *Blau* v. *Lehman, supra,* 368 U.S. at 411 n.11.[79]

In view of §16(b)'s purpose it might be argued that the exchange could yet be attributed to Occidental if it knew

76. See also *Ferraiolo* v. *Newman, supra,* 259 F.2d at 344-45 nn. 2 & 3.

77. "Defendants did not own the common stock in question before *they exercised their option to convert;* they did afterward. Therefore they acquired the stock within the meaning of the Act. . . . [T]he contention that defendants were forced to convert is somewhat *absurd* in view of the fact that . . . defendants *controlled plaintiff.* . . ." *Park & Tilford, Inc.* v. *Schulte, supra,* 160 F.2d at 987, 988 (Emphasis added).

78. *SEC* v. *National Securities, Inc.,* 393 U.S. 453 (1969); *Dasho* v. *Susquehanna Corp.,* 380 F.2d 262 (7 Cir.), *cert. denied,* 389 U.S. 977 (1967) (exchange by corporation); *Vine* v. *Beneficial Finance Co., Inc.,* 374 F.2d 627 (2 Cir.), *cert. denied,* 389 U.S. 970 (1967) (P. Br. 28).

79. See also *SEC* v. *National Securities, Inc., supra,* 393 U.S. at 466; *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Industries, Inc.,* 309 F. Supp. 75, 80-81 (E.D. Wis. 1970); *Emerson Electric Co.* v. *Reliance Electric Co., supra,* 306 F. Supp. at 591; See text at note 33, *supra.*

of the Kern-Tenneco merger when it offered to buy shares, although that would appear to be a §10 problem. But the Kern-Tenneco negotiations did not even begin until after Occidental was irrevocably committed to accept tenders, and that line of argument is eliminated. No one could know of a merger plan that did not exist. There has been no case which has imposed liability where the defendant did not control or have a realistic alternative to the alleged § 16(b) event.[80]

The same result follows under the "possibility of abuse" test, where the choiceless nature of the transaction is also relevant. This test has been adopted by every circuit, with the possible exception of one purely voluntary conversion case,[81] that has considered these issues and holds that an exchange is only a "purchase" or "sale" if it permitted an

80. See *Newmark* v. *RKO General, Inc., supra,* 425 F.2d at 353; *Blau* v. *Lamb, supra,* 363 F.2d at 518-20 nn.15 & 16; *Petteys* v. *Butler, supra,* 367 F.2d at 530; *Heli-Coil Corp.* v. *Webster,* 352 F.2d 156 (3 Cir. 1965) (no call for redemption); *Blau* v. *Lehman, supra,* 286 F.2d at 792; *Ferraiolo* v. *Newman, supra,* 259 F.2d at 346; *Park & Tilford, Inc.* v. *Schulte, supra,* 160 F.2d at 987-8; *Gold* v. *Scurlock, supra* (principal stockholders and directors of merging corporation with options not to participate in merger); *Lynam* v. *Livingston,* 276 F. Supp. 104, 106, 107 (D. Del. 1967); *Marquette Cement Mfg. Co.* v. *Andreas,* 239 F. Supp. 962, 966 (S.D.N.Y. 1965); *Blau* v. *Hodgkinson,* 100 F. Supp. 361 (S.D.N.Y. 1951) (option not to take stock on "purchase" side); *cf. Alloys Unlimited, Inc.* v. *Gilbert,* 319 F. Supp. 617, 619 (S.D.N.Y. 1970). See also *Booth* v. *Varian Associates, supra,* 334 F.2d at 5 (active directors); *Roberts* v. *Eaton, supra,* 212 F.2d at 83-84; *Blau* v. *Oppenheim,* 250 F. Supp. 881, 885 (S.D.N.Y. 1966); *Perlman* v. *Timberlake,* 172 F. Supp. 246, 256 (S.D.N.Y. 1959).

81. The Third Circuit, in a three-way split decision, found that a voluntary conversion was a "sale" but would not impose liability, holding that defendant's profits were not "realized" unless he sold for cash. *Heli-Coil Corp.* v. *Webster, supra,* 352 F.2d at 167-68. This rule has been construed in the same circuit not to create a purchase or sale where the conversion was "forced" by a call for redemption which defendant did not control. *Lynam* v. *Livingston, supra,* 276 F. Supp. at 107.

insider to obtain an advantage through the unfair use of inside information. *Blau* v. *Lamb, supra,* 363 F.2d at 516.[82] The standard in a merger case was articulated in *Newmark* v. *RKO General, Inc., supra,* 425 F.2d at 351:

> "The complexities of the commercial and financial world, however, have defied the draftsmen's efforts at neat classification. Whether certain 'unorthodox' transactions, well illustrated here by the exchanges of securities incident to a merger which form the basis of this appeal, are 'purchases' or 'sales' for the purposes of Section 16(b) cannot be resolved by mere reference to the words of the statute. In such cases, the determination of the statute's relevance must rest, initially, on whether there exists the potential for evil against which the statute was intended to guard."

In *Newmark* defendant "RKO" acquired the right to buy a controlling block of shares of the issuer corporation ("Central"), having first negotiated a secret agreement to merge it with "Frontier," an RKO subsidiary. Under the agreement Central would be managed in RKO's interest until the proposed merger. Not only could RKO purchase the Central shares knowing that it would exchange them in the merger, it also had complete control over "when or, for that matter, if the purchase and merger would take place," *id.* 353, and thus could choose to buy knowing it could sell advantageously or could abandon both parts of the transaction if it appeared unprofitable. Here the circumstances were opposite in all respects.

During a 4 day period in May 1967 Occidental, operating exclusively on public information, made two irrevocable offers for a total of a million shares of Kern stock at a price

82. See cases cited at note 74, *supra.*

30% above the market.[83] In contrast to RKO's private purchase Occidental made a firm commitment in the spotlight of a nationally publicized tender offer equally available to any Kern shareholder. Occidental was already irrevocably obligated to accept tenders[84] before Kern and Tenneco began the negotiations of May 15th which first resulted in an offer on May 18th.[85] Kern's incumbents successfully attracted a "defensive" merger partner and immediately accepted its terms, which were substantially richer than Occidental's own offer. The Kern-Tenneco merger was designed to *prevent* Occidental from controlling *anything* Kern did, and it was completely successful. If Occidental had any control over that merger, it is obvious that it would not have occurred within six months. Occidental's only choice was first to outbid Tenneco's tax-free offer and then to wage a proxy fight, while systematically opposed by Tenneco and Kern's hostile management, merely to prevent *them* from "disposing" of *its* shares in the short term, and this was no "choice" at all. No one has suggested how the alleged "disposition" might have been avoided. Compare *Alloys Unlimited, Inc.* v. *Gilbert,* 319 F. Supp. 617, 619

83. The high purchase premium alone negates speculative abuse, for it strains reason that an outsider would pay so high a price on a gamble that it would later learn inside information which would not only justify the price previously paid but also yield a quick profit. The court of appeals noted that there is "not a word in the record" to indicate Occidental had any nonpublic information concerning the value of Kern stock in making its offers (11A n.12).

84. *Cf. Radiation Dynamics, Inc.* v. *Goldmuntz,* CCH Fed. Sec. L. Rep. ¶ 93,548, — F. 2d — (2 Cir. 1972). (A party cannot "use material inside information unfairly when he fulfills contractual commitments which were incurred by him previous to his acquisition of that information.")

85. Petitioner noted that "the original negotiations of the Tenneco-Kern agreement took place during a period commencing May 15, 1967" (114a). Old Kern's president testified that on May 15 he "first learned" that Tenneco might be interested in exploring the possibility of making an offer (61a).

(S.D.N.Y. 1970). The merger exchange was pro rata, and all shareholders including Occidental received whatever advantages or disadvantages inhered in the terms set by Kern and Tenneco.

Even assuming *arguendo* that Occidental actually had and used inside information in determining *not* to fight the merger, this has no § 16(b) significance. Not only was the financial condition of Kern (and Tenneco) exhaustively set forth in the proxy statement, giving all shareholders an equal opportunity to assess the merits of the Plan, allowing for no insiders' advantage, see *Roberts* v. *Eaton, supra,* 212 F.2d at 85, but also the only possible result of an informed decision by Occidental would merely be that it would incur the same benefits or detriments shared by all Kern shareholders.[86] Because the transmutation of shares in the merger was on a pro rata basis, Occidental could not obtain any special insider's profit.[87] It neither bought

86. Petitioner repeatedly stresses its view that after the proposed merger was announced Occidental's exercise of its statutory right of inspection, available to all shareholders, gave Occidental "inside" information, although the record indicates that Kern's disclosure was grudging and minimal. As shown above, even possession of inside information at this stage in the sequence of events has no § 16(b) consequence. We also note that only the first 7 pages of the 134 page proxy statement have been reproduced in the Appendix here, although the entire statement is in the Record of the case. The shareholder vote on the Plan leaves no doubt as to its appeal.

87. See *Blau* v. *Max Factor & Co., supra,* 342 F.2d at 308; *Petteys* v. *Butler, supra,* 367 F.2d at 537; *Ferraiolo* v. *Newman, supra,* 259 F.2d at 346; *Roberts* v. *Eaton, supra,* 212 F.2d at 85 ("like treatment of all stockholders will in most cases remove the possibility of abuse"). See also *Shaw* v. *Dreyfus, supra;* compare *Marquette Cement Mfg. Co.* v. *Andreas, supra,* 239 F. Supp. at 966. The question of whether a merger exchange constitutes a "purchase" involves different considerations; compare *Gold* v. *Scurlock, supra; Marquette Cement Mfg. Co.* v. *Andreas, supra;* and *Blau* v. *Hodgkinson, supra* (P. Br. 28). When shareholders "purchase" stock in the surviving corporation in a merger they may acquire a trading advantage over other shareholders of that issuer because the exchange is not pro rata as to all of its shareholders. Moreover the defendants in these cases "purchased" voluntarily in that they could readily avoid participation in the merger. See notes 74 and 80, *supra.*

in a manner permitting abuse of information, nor could it get "out" at a more advantageous price or time. See *Newmark* v. *RKO General, Inc., supra,* 425 F.2d at 356.

Therefore the merger could not possibly serve as a vehicle for the abuses at which § 16(b) was aimed. *Blau* v. *Lamb, supra,* 363 F.2d at 516. From a *purchase* and *sale* in combination the statute presumes "that the [insider] intended, at the time he bought, to get out on a short swing."[88] But no presumption attaches to a purchase alone. A later-conceived pro rata exchange executed by others cannot substitute for an individually timed sale, for cash or other value, in the statutory scheme.[89]

These are not new considerations. In 1934, for example, a commentator stated flatly that a corporate liquidation like Kern's would not be a § 16(b) "sale" by shareholders:

> "[T]he individual stockholder has no freedom of action as to whether or not to surrender his stock certificate, in contrast to the case of a true exchange which is a voluntary act on the part of the seller." Seligman, *Problems under the Securities Exchange Act,* 21 VA. L. REV. 1, 22 (1934).

The district court in the *Reliance Electric* case said expressly that such a share exchange could not be treated as if it were a voluntary cash sale:

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88. *Hearings on S. Res.* 84 & S. *Res.* 56 & *S. Res.* 97 *Before the Senate Committee on Banking and Currency,* 73rd Cong., 1st Sess. 6556-57 (1934). The words are those of Thomas G. Corcoran, Esq.

89. This case is not about an individually negotiated and separately timed "exchange of shares" for other consideration, cash, stock, or otherwise. Thus, *Magida* v. *Continental Can Co.,* 261 F.2d 843 (2 Cir.), *cert. denied,* 351 U.S. 972 (1956), and *Blau* v. *Mission Corp.,* 212 F.2d 77 (2 Cir.), *cert. denied,* 347 U.S. 1016 (1954), relied upon by petitioner, (P. Br. 26-27) are irrelevant. See also *Blau* v. *Lamb, supra,* 242 F. Supp. 151, 155 (S.D.N.Y. 1965), *rev'd on other grounds,* 363 F.2d 507 (2 Cir. 1966), *cert. denied,* 385 U.S. 1002 (1967); *Fistel* v. *Christman,* 135 F. Supp. 830 (S.D.N.Y. 1955).

"Inasmuch as such a transaction is an 'otherwise dispose of' situation, and not a typical or conventional sale, the rationale of *Petteys* [v. *Butler*], supra, would undoubtedly require an examination of the 'unique' facts of the case to determine whether the purposes of Section 16(b) would be furthered by attaching the artificial label of 'sale' to this type of situation."[90]

The precise problem posed here was anticipated in commentary before the decision below:

"One special situation remains to be considered in which such an interpretation may lead to harsh results . . . where no merger was contemplated by the disappearing corporation at the time of the original purchase. Such a situation exists where corporation X seeks to acquire control of corporation Y and through a tender offer purchases enough Y shares to make it a 'beneficial owner' for purposes of section 16(b), but not enough to enable it to control Y. Corporation Y, however, does not wish to be taken over by X and to avoid this result enters into a merger with a third corporation Z. . . . Since the plan to merge was conceived only after the original purchase by corporation X, it cannot possibly have had advance knowledge of the Y-Z merger.

"Since the only reason for treating the exchange of A as a 'sale' is to deter short-swing speculation in anticipation of merger, the rationale of the subjective [i.e., "pragmatic"] test requires that a defend-

90. *Emerson Electric Co.* v. *Reliance Electric Co.*, 306 F. Supp. 588, 591 (E.D. Mo. 1969), *rev'd on other grounds*, 434 F.2d 918 (8 Cir. 1970), *aff'd*, 404 U.S. 418 (1972). The district court was thus unwilling to view the merger as a "sale," even though the defendant Emerson's tender offer was structured to give it the option not to accept any of the shares tendered, and the proposed Reliance-Dodge merger had been announced before Emerson exercised its option to purchase the tendered shares.

> ant be permitted to show that no merger was contemplated at the time of the initial purchase."[91]

The court below similarly concluded that such a merger could not be used for the trading practices which § 16(b) was designed to prevent:

> "[T]he question is whether the receipt of securities of another company, in a transaction which the 'insider' did not arrange and in which all stockholders were entitled, indeed here were forced to participate, constitutes a 'sale.' (10A).
>
> • • • • •
>
> "Occidental had no knowledge what Old Kern would do, and certainly did not know that Old Kern would be able to arrange an exchange offer exceeding Occidental's bid by $20 per share, with the added benefit of freedom from capital gains tax. We fail to see the possibility of speculative abuse in a situation where such an offeror simply declines to make a still higher offer or to attempt to block a transaction which it regards as advantageous to all the stockholders including itself." (12A) (footnote omitted).

Other critical commentators both before and after the decision below have approved the result here.[92]

Thus petitioner's position has no support. The supplemental opinion of the district court in *American Standard*,

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91. Note, *Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?*, 117 U. PA. L. REV. 1034, 1056-57 (1969) (footnote omitted).

92. Note, *Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?*, *supra* note 33, at 911; Gadsby & Treadway, *Recent Developments Under Section 16(b) of the Securities Exchange Act of 1934*, 17 N.Y.L. FORUM 687, 722 (1971); Note, *The "Pragmatic" Approach to Section 16(b)—Abrams v. Occidental Petroleum Corp.*, 38 BROOKLYN L. REV. 1235 (1972); Comment, *Securities Regulation—Exchange of Stock Pursuant to Merger is "Sale" by an Insider Under Section 16(b) of the Securities Exchange Act of 1934*, 84 HARV. L. REV. 1012, 1021-22 & n.30 (1971).

Inc. v. *Crane Co.*,[93] a case upon which petitioner had relied, clarifies the facts of that case and indicates that the defendant there sold its shares for *cash* within six months of its purchase. This clarification renders the court's previous language regarding merger exchanges mere surplusage. CCH Fed. Sec. L. Rep. ¶ 93,551 (S.D.N.Y. July 6, 1972).

Rather than deterring abuses, petitioner's approach would inspire an entire range of new abuses. This too was the subject of a recent commentary:

> "In other words, . . . not only did A [Occidental] fail in its attempt to take over B [Kern], but B [Kern] (or successor C [Tenneco]) was able to penalize A [Occidental] for the attempt. This will be true in any case in which B [Kern] can arrange for a takeover by C [Tenneco] within six months of A's [Occidental's] purchase of B's [Kern's] stock. B[Kern] thus forces A [Occidental] into a section 16(b) 'sale' from which B [Kern] recovers the 'profit' . . . . Such a use of the securities laws seems unwarranted, ... In terms of fairness, where an individual subject to section 16(b), but obviously not in control, is forced or obligated to transform his investment into shares of a successor corporation, the purpose of section 16(b) should not require the forfeiture of his paper profits."[94]

After Kern's board approved the Tenneco offer on May 19, Occidental should not have been required to engage in a groundless proxy fight, involving other shareholders and use of the courts, or any other acts of opposition to the proposed merger as a condition of avoiding a § 16(b) liability. Nor should it have been required to feign displeasure at the

93. CCH Fed. Sec. L. Rep. ¶ 93,237 (S.D.N.Y., October 12, 1971) (withdrawn).

94. Comment, *Securities Regulation—Exchange of Stock Pursuant to Merger is "Sale" by an Insider Under Section 16(b) of the Securities Exchange Act of 1934*, *supra* note 92, at 1021-22 (footnote omitted).

prospect that, although its bid had failed, its investment might yet prove profitable (although here the option made profit uncertain). A decision encouraging a proxy fight or symbolic opposition to avoid liability merely mandates a wasteful charade of no benefit to the shareholders of any corporation involved.

Petitioner's position would place a defeated bidder in an impossible situation, which shows the "manifestly absurd and unfair result that can flow from such a *per se* black-letter rubric," *Petteys* v. *Butler, supra,* 367 F.2d at 535-36. The disfavored bidder would have to acquire control of the target corporation against all opposition merely to prevent a "disposition" within 6 months. To do so it would have to both outbid its opponent and engage in an expensive proxy fight and management contest. Even if it spent large sums on intercorporate warfare, it would probably fail and suffer § 16(b) liability in addition, for the candidate favored by the incumbents has both an enormous advantage by reason of its favored position and also a terrific incentive. If the favored candidate wins control and causes a merger within 6 months, it captures a "sure-thing" windfall in the form of its opponent's §16(b) "profits." The large number of shares necessarily involved will guarantee it a huge recovery. Indeed this prospect would permit the favored candidate to make an offer above reasonable levels, knowing that it could finance the offer from the defeated bidder's "profits." Yet the favored contestant will risk no § 16(b) liability in the contest, for one *in fact* dealing cozily with the target's management need not first acquire a large block of shares. It is clearly not the purpose of § 16(b) to reward the person who causes the alleged "disposition" nor to extract "profits" from the disfavored bidder. Such a construction converts the statute from one meant to prevent the unfair use of inside information into a weapon to protect management against efforts to change it, a clear perversion of its purpose.

Petitioner's position stands § 16(b) on its head. The statute operates against insider abuses by discouraging short-term transactions. But recovery here will encourage short-term "merger-sales" by ensuring a reward for those who cause them. Petitioner's theory would not merely permit those controlling the merger to decide *if* the losing bidder would suffer § 16(b) liability. They could also determine *how much* liability he would suffer by choosing a closing date when the merger stock reached their own view of its maximum price.[95] See *Newmark* v. *RKO General, Inc., supra,* 425 F.2d at 353.

Petitioner suggests that its construction would discourage only tender offers "made primarily with a manipulative objective in mind" (P. Br. 29). Quite to the contrary, the statute would not distinguish between bona fide tender offers and "manipulative" ones but only between mergers rushed through within six months and those which are not. Petitioner's position would only induce unsuccessful bidders to attempt to delay a proposed merger by proxy fights, litigation, or other artificial means, thereby making liability turn upon a bizarre contest between the opposing bidders to accelerate or retard the closing date.

The whole thrust of petitioner's argument conflicts with the judgment of Congress, which directly addressed the issue of control contests by cash tender offer in the Williams Act amendments of 1968.[96] Hearings showed that such offers

95. This would effectively compel the disfavored bidder to sell his merger stock for cash just to pay the recovery due—and thereby risk § 16(b) liability for that sale as well. The proceeds of such a sale would be unlikely to match the artificial "profits" he is thus forced to "realize," because his merger "sale" price might well be said to be the highest market quotation on the closing date, *cf. Blau* v. *Lehman,* 173 F. Supp. 590, 595 n.3 (S.D.N.Y. 1959), *aff'd,* 286 F.2d 786 (2 Cir. 1960), *aff'd,* 368 U.S. 403 (1962); *Marquette Cement Mfg. Co.* v. *Andreas, supra,* 239 F. Supp. at 968, while the actual proceeds would be measurably lower.

96. The Williams Act amendments to the Securities Exchange Act, §§ 13(d)-(e); 14(d)-(f) of the Act; 15 U.S.C. §§ 78m(d)-(e); 78n(d)-(f).

often stimulated or displaced inefficient management, to the benefit of all shareholders,[97] and Congressional committees decided that federal policy should not give significant advantages to either bidder or target:

> "The committee has taken *extreme care* to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."[98]

In the Williams Act Congress dealt with cash tender offers by a balanced treatment of disclosure and regulation, inconsistent with petitioner's theory, which would penalize actual bidders and chill potential ones by automatically requiring them to reward their opponent with a huge recovery and thereby finance their own defeat.[99]

Petitioner seems to argue for a new presumption, unrelated to the use of inside information, by which all tender offerors would be held to foresee a short-term adversary merger, resting wholly upon testimony by the then Chairman of the SEC as to his "feelings" (P. Br. 29-30), without stating that the substance of his testimony was withdrawn by supplementary letter of the same date when members of the House committee requested evidentiary support.

> "After a review of our records, I find that we have no information on the total number of tender offers made during any recent period, on the spread between the tender prices and the market prices at the time the offers were made, on the number of offers which were successful during any recent period or on the number of persons who made tender

97. S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

98. *Id.* (Emphasis added). The identical statement of policy appears in H.R. REP. No. 1711, 90th Cong., 2d Sess. 4 (1968).

99. As Judge Friendly noted, the only way a tender offeror could protect itself would be by limiting its bid to less than 10%, which, by emasculating the offer, would confer additional protection on incumbents, contrary to the Congressional judgment not to do so (13A n.15).

> offers and thereafter sold their holdings to persons making counter offers."[100]

Instead, studies, including one cited by the Chairman in retracting his testimony as the "most complete" available,[101] showed that incumbents have many tactics to resist share solicitations[102] and resort to a "defensive" merger only "if all else fails."[103] Another stated:

> "Realistically this is not a defense tactic, but rather a form of orderly retreat and *one would expect that unless such a merger was being actively considered prior to the tender offer, it would be viewed by incumbent management only as a last, albeit very effective, resort.*"[104]

More importantly all of the concerns raised over tender offer practices have "nothing to do with inside information" and thus nothing to do with § 16(b).[105] Congress has regulated tender offers in one way and can further regu-

100. *Hearings on H.R. 14475 & S. 510 Before Subcommittee on Finance and Commerce, House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 21 (1968).

101. *Id.*

102. Through such "defensive" measures as changes in capital and voting structures, placement of shares in friendly hands, stock repurchases, various methods to increase outstanding shares, increased dividends or promises thereof, litigation, and so forth, all used in connection with the prestige and informational advantage enjoyed by the incumbents. See, *e.g.*, O'Hanlon, *Goodrich's Four-Ply Defense*, FORTUNE, July 1969, at 110; Note, *Defensive Tactics Employed by Incumbent Management in Contesting Tender Offers*, 21 STAN. L. REV. 1104, 1111-27 (1969).

103. Hayes & Taussig, *Tactics of Cash Takeover Bids.*, 45 HARV. BUS. REV., Mar.-Apr. 1967, 135 at 146 (1967), reprinted in *Hearings on S. 510 Before Subcommittee on Securities, Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. (1967), App. 2, at 222.

104. Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115, 132 (1967) (Emphasis added; footnote omitted).

105. Note, *Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?*, *supra* note 33, at 911.

late them if it sees fit, but it has reserved the extraordinary remedy of § 16(b) for trading on inside information.

Petitioner has retreated from arguments it made below,[106] seeking to show that Occidental could have used information unfairly in the merger exchange, and instead attempts to "color" this case, stating that Occidental "threatened" a proxy fight and otherwise coerced Tenneco, so that Occidental could submit to an option. Such claims are contradicted by the record, but, more important, they are red herrings. This is a § 16(b) case. Submission to an option is not a sale; the merger was not a sale. This argument is merely a pooling of weaknesses and was properly rejected below:

> "Appellees argue finally that Occidental took advantage of its position to get something for itself that was not available to other Old Kern stockholders and that we should therefore consider this option as a 'sale,' despite the contrary implication of Silverman v. Landa. . . . Although we do not decide the point, appellees' argument might indeed have force if Occidental had acquired a 'put,' [a *right* to sell] . . . rather than having submitted itself to a 'call.' But the two situations are quite different . . ." (15A-16A),

and, in accordance with the record, ". . . we cannot see how Occidental took any advantage of its position here" (16A). Such argument was both legally irrelevant and factually without support.

The remaining points require only brief treatment. The first is the implication which petitioner seeks to draw from the Commission's response to a proposal, made by a committee of the Association of the Bar of the City of New York, which would have exempted from § 16(b) all mergers

106. In the Second Circuit petitioner presented hypotheses which it claimed would illustrate how a tender offeror could use post-offer information for an unfair trading advantage. We showed that each was specious, and they have not been repeated here.

and similar transactions in all circumstances on the theory that receipt of new securities should not be a "realization" under §16(b) (P. Br. 31). This blanket exemption, based upon an entirely different theory, covering all "purchase" and "sale" prototypes in all situations, is totally irrelevant to the questions at bar. See *Blau* v. *Lamb, supra,* 363 F.2d at 524.

The other is the claim that without an exemptive rule by the Commission the courts are powerless to prevent a perversion of the statute. Whether § 16(b) can be triggered by a defendant's being "disposed of" his shares by the acts of others, to the extent it is arguable, is a question for the courts, to which Congress has given the duty of enforcement. No "exemption" is needed where an alleged "sale" is not a matter of the defendant's choice, for prima facie there is no coverage by the statute. The Commission's position is consistent with this; it is presently arguing as amicus curiae in *Gold* v. *Scurlock, supra,* that because of defendants' active control, appraisal rights, and other options not to participate (none available here), a merger became their voluntary "purchase" and their subsequent cash sale of shares should trigger the Act.[107]

Even where claims are based on a defendant's own acts, courts of appeals have consistently rejected the argument that only a general exemptive rule can settle whether a problematical exchange of shares is a § 16(b) "purchase" or "sale."[108] Since "the primary duty of administering § 16(b)" is placed on the courts, while the Commission has only exemptive power, *Blau* v. *Max Factor & Co., supra,* 342 F.2d at 307 n.5, and "the purposes of the Act are stated clearly and appear side-by-side with the literal demands,"

107. Brief for SEC as Amicus Curiae at 19, *Gold* v. *Scurlock, supra, appeal pending,* No. 71-2180-82, 4 Cir.

108. *Newmark* v. *RKO General, Inc., supra,* 425 F.2d at 351; *Blau* v. *Max Factor & Co., supra,* 342 F.2d at 307 n.5; *Petteys* v. *Butler, supra,* 367 F.2d at 536; *Blau* v. *Lamb, supra,* 363 F.2d at 519.

Petteys v. *Butler*, *supra*, 367 F.2d at 536, courts must decide whether a case comes within the statutory language, read in the light of its expressed purpose. This has been the rule since *Shaw* v. *Dreyfus*, *supra*, in 1949. Congress has been well aware of this application of the statute, and it must be regarded as a settled issue.[109]

The Second Circuit here properly rejected an unjustified construction of the Act which would have perverted its purpose. It had no need to reach the unfair result that those claiming recovery based on their own acts should extract a reward from one who in fact caused benefits to inure to all shareholders, as tender offers often do, and thus repel future offers. It did not weigh any "equities," as petitioner claims, and it so stated, since it did not regard the substantive § 16(b) question as even close (12A). But it was not required to suppress its apprehension over the necessary consequences of petitioner's position (13A). Its decision was plainly correct.

109. The Commission has noted that: "The Act makes such profits recoverable in private litigation, thus placing upon the courts the ultimate responsibility for the interpretation of Section 16(b). . . ." SEC Securities Exchange Act Release No. 4509 (Oct. 30, 1950). "The question whether liabilities under Section 16(b) will arise from transactions is, of course, to be determined by the facts of each particular case in an appropriate action brought by the issuer or its security holders." SEC Securities Exchange Act Release No. 7824 (Feb. 14, 1966); see SEC Securities Exchange Act Release No. 9499 (Feb. 23, 1972).

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit is correct in its application of § 16(b) to both issues presented and should be affirmed.

Respectfully submitted,

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September 15, 1972.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1059

KERN COUNTY LAND COMPANY,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER KERN COUNTY LAND COMPANY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER KERN COUNTY LAND COMPANY

Petitioner respectfully submits this brief in reply to the answering brief of respondent Occidental Petroleum Corporation.

Occidental's "Counterstatement of the Case"

Occidental's 16-page "Counterstatement of the Case" confirms petitioner's showing that the decision below rests upon an *ad hoc* approach to Section 16(b) which would make Section 16(b) liability turn upon the particular facts of the particular case. Thus, Occidental enters into a detailed recital of its version of the facts in an apparent

effort to convince this Court of its lack of speculative purpose or intent, or access to inside information.

Since petitioner believes that it is the *kind of transaction*, objectively defined, which determines Section 16(b) liability rather than the particular facts of the particular case, including facts relating to such issues as the insider's intent and actual access to insider information, we make no effort to refute Occidental's self-serving statement item by item but simply note that it is one litigant's pre-trial version (there having been no trial below) of what occurred.*

In contrast to the detailed facts, the *kinds of transactions* involved here are undisputed. Occidental's purchase of Old Kern common stock, the Tenneco-Occidental option agreement and the exchange of Old Kern stock for Tenneco

* For example, while Occidental's brief denies that it had access to any inside information and treats as *de minimus* its five-man inspection of Old Kern's records (Br., pp. 10-11), the affidavit of Old Kern's Chairman demonstrates that prior to entering into the Option Agreement, Occidental's lawyers and accountants in fact inspected such non-public documents as Old Kern's general ledger, consolidating financial statements, consolidating journal entries, details of cash receipts from oil operations, supporting trial balances and other records over a six-day period (286a).

Similarly, while Occidental's brief denies that it ever threatened Tenneco with a proxy fight (pp. 11-12), the fact is that as late as May 31, 1967, in the midst of the negotiations with respect to the Option Agreement, Occidental filed a petition, sworn to by an Occidental officer, in the California Superior Court, stating that it had not decided whether or not "to oppose" the Tenneco-Old Kern transaction, and citing the time needed "to prepare proxy soliciting material" and "to file preliminary copies of such proxy soliciting material with the Securities and Exchange Commission" (474a-477a). Thus, despite Occidental's present denials, it is clear that Occidental used the leverage inherent in its 20% stock ownership position to help obtain for itself special treatment in the form of the Option Agreement.

Although we do not believe such facts as the foregoing are necessary to impose Section 16(b) liability upon Occidental, they do point up the abuses that may result from the kinds of short-swing transactions presented here.

Preference Stock are reflected in unambiguous written documents not susceptible to dispute. Petitioner respectfully submits that the only issues here are whether those *kinds of transactions* give rise to Section 16(b) liability.

The Occidental Option

In its argument concerning the June 2, 1967 option agreement, Occidental attempts at great length to demonstrate that an option is different from a conventional sale. However, as the Court of Appeals for the Seventh Circuit held in *Bershad* v. *McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, 400 U. S. 992 (1971), "[t]he phrase 'any purchase and sale' in Section 16(b) is . . . not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties" (428 F.2d at 697).

The *Bershad* decision holds that an insider's sale of an option is a "sale" under Section 16(b), noting that "[t]he insider's sale of options in his stock is well adapted to speculation and abuse of inside information, whether or not the option is subsequently exercised" and that "[s]ale of such purchase rights provides an easy vehicle for the use of inside information in extracting profits from the stock itself" (428 F.2d at 698).

Occidental's answering brief completely fails to meet the point made by the Seventh Circuit in the *Bershad* opinion concerning the speculative possibilities inherent in an insider's sale of an option, *qua* option. Instead, while conceding that an insider's short-swing sale of an option *may* fall within Section 16(b), Occidental would have the courts, in effect, attempt to distinguish "good" options from "bad" options and make each option case turn upon its distinctive facts.

Thus, Occidental attempts to demonstrate that the option in *Bershad* was a "bad" option because the premium was 14% of the purchase price (here it was just under 10%); the exercise price was allegedly 15% under market (here it was nearly 10% below Occidental's contemporaneous evaluation)*; and "incidents of stock ownership" were transferred (Occidental now concedes that simultaneously with the option it too conveyed a proxy to Tenneco; it also abandoned its pending demand for seats on Old Kern's Board).** The question of where the courts are supposed to draw the line between the "good" option and the "bad" option is carefully avoided.

In contrast to the *Bershad* option, Occidental attempts to demonstrate that its option was a "good" option. Indeed, as described by Occidental in its brief, its option was so fraught with risks and uncertainties that one wonders why Occidental would ever have, as it now admits (Br., p. 11), sought out Tenneco and proposed such a transaction. This gloomy appraisal is in sharp contrast to the contemporaneous appraisal given to Fortune Magazine by Occidental's President, Armand Hammer, shortly after the Option Agreement was entered into. At that time, Dr. Hammer, expressing no uncertainties as to whether or not the option

* As demonstrated in petitioner's main brief, Occidental's investment bankers appraised the Tenneco Preference Stock at $105 per share, which figure Occidental gave to its stockholders in its quarterly report, dated May 19, 1967. Thus, the $95 per share needed to exercise the June 2, 1967 Option Agreement (the $10 premium being credited against the option price) was nearly 10% below the value Occidental had just publicly assigned to the Tenneco shares. As in *Bershad*, exercise of the option was a virtual certainty.

** One contrast with *Bershad* Occidental totally ignores is the magnitude of the transaction. Here the non-refundable option price was nearly $9 million and concerned a $93 million block of stock. Trying to evaluate such an option in terms of the everyday put and call market is to ignore reality. For Tenneco or its assignee to forfeit the $9 million cash-in-hand paid to Occidental (while legally possible) was unlikely in the extreme.

would be exercised or whether a loss to Occidental could possibly result, boasted of looking forward to a profit of over $17 million, which he aptly observed "isn't bad for two weeks' work". Clearly, in Dr. Hammer's mind, the option was a sale.

Given the statutory definition of "sale" set forth in Section 3(a)(14) of the Securities Exchange Act, which the opinion below recognized includes the Occidental option (13A), Occidental's plea for a judicial exemption from the Act must, we respectfully submit, be denied. The Occidental option was an entirely voluntary transaction on its part. Admittedly, within days of becoming a statutory insider of Old Kern, Occidental sought out Tenneco, asked Tenneco's chairman "if he was interested in acquiring Occidental's Kern stock" (Occidental Br., p. 11), and turned to an option only because it hoped to avoid the impact of Section 16(b).

But, unlike the insider who waits the statutory six-month period before entering into a securities transaction, thereby avoiding 16(b), Occidental made its investment decision to enter into the Option Agreement on June 2, 1967, within one month of its purchase of 20% of Old Kern, based upon facts and conditions then available and known to it, and giving its proxy to vote the stock in question. It thereby immediately realized about $9 million cash-in-hand, in a transaction that ultimately netted it an $18 million profit, instead of the much lesser profit it would have made had it not sold its shares until six months had passed (see Petitioner's Main Br., p. 19). Occidental would have its cake and eat it too—enjoying the benefits of a short-swing transaction, without paying the price that Section 16(b) mandates.

The Occidental Exchange

In its discussion of the August 30, 1967 exchange of Old Kern shares for shares of Tenneco Preference Stock, Occidental would have this Court carve from Section 16(b) a special exemptory rule for beneficial owners of more than 10% of a class of equity securities, provided they have acquired such securities by means of a tender offer. This, of course, is exactly the relief Occidental unsuccessfully sought from the Securities and Exchange Commission in the summer of 1967. Indeed, Occidental's brief to this Court sets forth the very same arguments it then urged upon the Commission (202a-238a).

In urging that tender offerors should be accorded special treatment under Section 16(b), Occidental assumes that acquisition of securities in a tender offer followed by their short-swing disposition in a merger with another company presents little likelihood of speculative abuse. Such contention, however, like Occidental's proposed differentiation of "good" options from "bad" options, would require the courts to make an *ad hoc* disposition of each tender offer case arising under Section 16(b). Here, too, the courts would be called upon, in effect, to distinguish between "good" tender offerors and "bad" tender offerors, *i.e.*, those guilty of speculative abuse.

For the reasons set forth in petitioner's main brief, we respectfully submit that no such *ad hoc* treatment of tender offerors is indicated. Not only would it be contrary to all prior authority, but it would also undermine the "mechanical quality" of the statute, a feature stressed by this Court in its recent opinion in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418 (1972).

Occidental's brief to the contrary, there is absolutely no reason to assume that "unrestricted operation of the section",* will discourage *bona fide* tender offers. A Section

* *Cf.*, letter dated November 24, 1965 from the Securities and Exchange Commission to the Special Committee on Securities Regulation of the Association of the Bar of the City of New York, quoted in petitioner's main brief at pages 31-32.

16(b) recovery does not impose any penalty whatever on the unsuccessful tender offeror, leaving him with the full amount of his original investment. The notion that, in addition, he needs to be rewarded with the short-swing profits of his unsuccessful efforts is completely unfounded.

Nor is there any reason to assume that the tender offer situation presents no possibility for speculative abuse. See Note, 72 Colum. L. Rev. 1090, 1098 *et seq.* (1972). Here, Occidental itself was able to use its better than 20% position in Old Kern to obtain for itself under the Option Agreement a profit not enjoyed by the other shareholders.

Consequently, petitioner respectfully submits that, separate and apart from the question of whether the option itself constituted a "sale" for purposes of Section 16(b), Occidental's subsequent exchange of its shares of Old Kern must be deemed such a "sale".

CONCLUSION

For the reasons set forth above and in petitioner's main brief, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KERN COUNTY LAND CO. *v.* OCCIDENTAL PETROLEUM CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–1059. Argued December 5–6, 1972—Decided May 7, 1973

During a tender-offer campaign, respondent bought more than 10% of the outstanding stock of petitioner's predecessor (Old Kern). Respondent was blocked in its takeover efforts by a defensive merger between Old Kern and Tenneco, in which Old Kern stockholders were to receive new Tenneco stock on a share-for-share basis. Less than a month after its initial tender offer, respondent thereupon negotiated a binding option to sell to Tenneco at a date over six months after the tender offer expired all the new Tenneco stock to which respondent would be entitled when the merger took place. Sale of the post-merger stock yielded respondent a profit of some $19 million, which petitioner sought to recover by a suit under § 16 (b) of the Securities Exchange Act of 1934, prohibiting profitable short-swing speculation by statutory insiders. The District Court's summary judgment for petitioner was reversed by the Court of Appeals. *Held*: The transactions, which were not based on a statutory insider's information and were not susceptible of the speculative abuse that § 16 (b) was designed to prevent, did not constitute "sales" within the meaning of that provision. Pp. 9–22.

(a) There was nothing in connection with respondent's tender-offer acquisition of Old Kern stock or the exchange thereof for the Tenneco stock that gave respondent "inside information," and once the merger, which respondent did not originate, was approved the Old Kern-Tenneco stock exchange was involuntary. Pp. 14–18.

(b) The option agreement was not of itself a "sale"; the option was grounded on the mutual advantages to respondent as a minority stockholder that wanted to terminate an investment it had not chosen to make and Tenneco whose management did not want a potentially troublesome minority stockholder; and the

Syllabus

option was not a source of potential speculative abuse, since respondent had no inside information about Tenneco or its new stock. Pp. 18–22.

450 F. 2d 157, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1059

Kern County Land Company, Petitioner, *v.* Occidental Petroleum Corporation.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 7, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b),[1] provides that officers, directors, and holders of more than 10% of the listed

[1] "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer [other than an exempted security] within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial

stock of any company shall be liable to the company for any profits realized from any purchase and sale or sale and purchase of such stock occurring within a period of six months. Unquestionably, one or more statutory purchases occurs when one company, seeking to gain control of another, acquires more than 10% of the stock of the latter through a tender offer made to its shareholders. But is it a § 16 (b) "sale" when the target of the tender offer defends itself by merging into a third company and the tender offeror then exchanges his stock for the stock of the surviving company and also grants an option to purchase the latter stock that is not exercisable within the statutory six months period? This is the question before us in this case.

I

On May 8, 1967, after unsuccessfully seeking to merge with Kern County Land Company (Old Kern),[2] Occidental Petroleum Corporation (Occidental) [3] announced an offer, to expire on June 8, 1967, to purchase on a first-come, first-served basis 500,000 shares of Old Kern com-

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owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p (b).

[2] Old Kern was a California corporation having substantial real estate holdings, including oil producing lands, oil exploration activities, cattle ranching, cattle feeding operations, and interests in the manufacture of automotive parts, electronic systems and devices, and farm machinery and construction equipment. After the reorganisation described in text, Old Kern became known as the 600 California Corporation until its eventual dissolution under California law on October 6, 1967.

[3] Occidental is respondent in this Court. A California corporation with its principal place of business in California, Occidental is engaged in the production and sale of oil, gas, coal, sulphur, and fertilisers.

mon stock [4] at a price of $83.50 per share plus a brokerage commission of $1.50 per share.[5] By May 10, 1967, 500,000 shares, more than 10% of the outstanding shares of Old Kern,[6] had been tendered. On May 11, Occidental extended its offer to encompass an additional 500,000 shares. At the close of the tender offer, on June 8, 1967, Occidental owned 887,549 shares of Old Kern.[7]

Immediately upon the announcement of Occidental's tender offer, the Old Kern management undertook to frustrate Occidental's takeover attempt. A management letter to all stockholders cautioned against tender and indicated that Occidental's offer might not be the best available, since the management was engaged in merger discussions with several companies. When Occidental

[4] The Old Kern stock was registered pursuant to § 12 of the Securities and Exchange Act of 1934, as amended, 15 U. S. C. § 78. The stock was a nonexempt, equity security for purposes of § 16 (b).

[5] The Old Kern stock closed at 63⅝ on Friday, May 8, 1967, the last trading day prior to the announcement of the tender offer. It had reached a high of 64⅞ and a low of 57⅜ in 1967, a high of 76¼ and a low of 51¾ in 1966, a high of 71⅝ and a low of 56 in 1965, and a high of 70⅜ and a low of 56⅝ in 1964. Thus, the $85 per share tender offer price represented a substantial profit for shareholders of Old Kern.

[6] On May 10, Old Kern had 4,328,000 shares outstanding.

[7] On May 18, 1967, Occidental filed a Form 3, Initial Statement of Beneficial Ownership of Securities, with the Securities and Exchange Commission indicating direct ownership of 507,055 shares of Old Kern stock; on June 9, 1967, Occidental filed a Form 4, Statement of Changes in Beneficial Ownership of Securities, for the month of May, indicating the purchase of an additional 376,326 shares of Old Kern stock, for a total ownership as of May 31, 1967, of 83,381 shares. An additional 4,168 shares were purchased by June 8, 1967, so that as of June 30, 1967, Occidental held 887,549 shares of Old Kern stock. This figure included 1,900 shares which Occidental purchased on the open market in April 1967. Section 16 (b) liability is not asserted with respect to these shares, because these purchases did not make Occidental a "beneficial owner" for purposes of § 16 (b).

extended its tender offer, the president of Old Kern sent a telegram to all stockholders again advising against tender. In addition, Old Kern undertook merger discussions with Tenneco, Inc. (Tenneco),[8] and, on May 19, 1967, the Board of Directors of Old Kern announced that it had approved a merger proposal advanced by Tenneco.[9] Under the terms of the merger, Tenneco would acquire the assets, property, and goodwill of Old Kern, subject to its liabilities, through "Kern County Land Company" (New Kern),[10] a new corporation to be formed by Tenneco to receive the assets and carry on the business of Old Kern. The shareholders of Old Kern would receive a share of Tenneco cumulative convertible preference stock in exchange for each share of Old Kern common stock which they owned. On the same day, May 19, Occidental, in a quarterly report to stockholders, appraised the value of the new Tenneco stock at $105 per share.[11]

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[8] Tenneco, a Delaware corporation, is a diversified industrial company with operations in natural gas transmission, oil and gas, chemicals, packaging, manufacturing, and shipbuilding. Tenneco is not a party to this litigation.

[9] Although technically a sale of assets, the corporate combination has been consistently referred to by the parties as a "merger" and will be similarly denominated in this opinion. The only significance of the characterization is the fact that a sale of assets required, under California law, approval of only a majority of the Old Kern shareholders and provided no appraisal rights for dissenters.

[10] New Kern, a Delaware corporation with its principal place of business in California, is petitioner in this Court and is a wholly owned subsidiary of Tenneco Corporation. Tenneco Corporation is, in turn, a wholly owned subsidiary of Tenneco and owns all of the capital stock or controlling interests in most of Tenneco's nonpipeline operating subsidiaries. When first incorporated, New Kern was known as KCL Corporation.

[11] The annual dividend of $5.50 per share on the new Tenneco stock would be more than double the current annual dividend of $2.60 per share on the Old Kern stock. Each share of the new

Occidental, seeing its tender offer and takeover attempt being blocked by the Old Kern-Tenneco "defensive" merger, countered on May 25 and 31 with two mandamus actions in the California courts seeking to obtain extensive inspection of Old Kern books and records.[12] Realizing that, if the Old Kern-Tenneco merger were approved and successfully closed, Occidental would have to exchange its Old Kern shares for Tenneco stock and would be locked into a minority position in Tenneco, Occidental took other steps to protect itself. Between May 30 and June 2, it negotiated an arrangement with Tenneco whereby Occidental granted Tenneco Corporation, a subsidiary of Tenneco, an option to purchase at $105 per share all of the Tenneco preference stock to which Occidental would be entitled in exchange for its Old Kern stock when and if the Old Kern-Tenneco merger was closed.[13] The premium to secure the option, at $10 per share, totaled $8,866,230 and was to be paid immediately upon the signing of the option agreement.[14] If the

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Tenneco preference stock was convertible into 3.6 shares of Tenneco common stock. During 1967, Tenneco common stock had sold at a high of 32½ and a low of 20⅞. Moreover, in contrast to Occidental's cash offer, the Tenneco exchange was expected to be, and was ultimately approved by the Internal Revenue Service as, free of capital gains tax.

[12] Prior to any court ruling on Occidental's mandamus petitions, Old Kern voluntarily permitted inspection of Old Kern's general ledger, consolidated financial statements, consolidated journal entries, details of cash receipts from oil operations, supporting trial balances, and other records over a six-day period. A list of stockholders, however, was withheld.

[13] The agreement covered 886,623 shares. This figure is 926 shares less than the number of Old Kern shares ultimately owned by Occidental. This discrepancy apparently results from uncertainty as to the number of shares tendered.

[14] An outside investment banking firm in New York had determined that between $9 and $12 per share was a fair premium on an option on the Old Kern stock.

option were exercised, the premium was to be applied to the purchase price. By the terms of the option agreement, the option could not be exercised prior to December 9, 1967, a date six months and one day after expiration of Occidental's tender offer. On June 2, 1967, within six months of the acquisition by Occidental of more than 10% ownership of Old Kern, Occidental and Tenneco Corporation executed the option.[15] Soon thereafter, Occidental announced that it would not oppose the Old Kern-Tenneco merger and dismissed its state court suits against Old Kern.[16]

The Old Kern-Tenneco merger plan was presented to and approved by Old Kern shareholders at their meeting on July 17, 1967. Occidental refrained from voting its Old Kern shares, but in a letter read at the meeting Occidental stated that it had determined prior to June 2 not to oppose the merger and that it did not consider the plan unfair or inequitable.[17] Indeed, Occidental indicated that, had it been voting, it would have voted in favor of the merger.

Meanwhile, the Securities and Exchange Commission had refused Occidental's request to exempt from possible

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[15] On that date, and on the date of the exercise of the option, Old Kern common stock was selling at approximately $95 per share.

[16] Seeking to prevent its acquisition of Tenneco shares pursuant to the merger from being matched with the sale of those shares upon exercise of the option for purposes of establishing § 16 (b) liability, Occidental asked that the new Tenneco stock not be immediately registered pursuant to § 12 of the Securities Exchange Act of 1934, 15 U. S. C. § 78e. See 450 F. 2d, at 160, n. 6.

[17] The letter indicated that Occidental "did not consider it to be in its best interest, or the best interest of its shareholders, or the best interest of KCL Shareholders generally for it to [oppose] the transaction." However, Occidental stated that "[i]n view of the fact that we would rather have worked out our own transaction with KCL, we shall not vote our KCL shares at the KCL Shareholder's Meeting on July 17, 1967." Under applicable California law, the abstention from voting was tantamount to opposing the merger.

§ 16 (b) liability Occidental's exchange of its Old Kern stock for the Tenneco preference shares that would take place when and if the merger transaction were closed. Various Old Kern stockholders, with Occidental's interests in mind, thereupon sought to delay consummation of the merger by instituting various lawsuits in the state and federal courts.[18] These attempts were unsuccessful, however, and preparations for the merger neared completion with an Internal Revenue Service ruling that consummation of the plan would result in a tax-free exchange with no taxable gain or loss to Old Kern shareholders and with the issuance of the necessary approval of the merger closing by the California Commissioner of Corporations.

The Old Kern-Tenneco merger transaction was closed on August 30. Old Kern shareholders thereupon became irrevocably entitled to receive Tenneco preference stock, share-for-share in exchange for their Old Kern stock. Old Kern was dissolved and all of its assets, including "all claims, demands, rights and choses in action accrued or to accrue under and by virtue of the Securities Exchange Act of 1934 . . . ," were transferred to New Kern.

The option granted by Occidental on June 2, 1967, was exercised on December 11, 1967. Occidental, not having previously availed itself of its right, exchanged certificates representing 887,549 shares of Old Kern stock for a certificate representing a like number of shares of Tenneco preference stock. The certificate was then endorsed over to the optionee-purchaser, and in return $84,229,185 was credited to Occidental's accounts at various banks. Adding to this amount the $8,886,230 premium paid in June, Occidental received $93,905,415 for its Old Kern stock (including the 1,900 shares acquired prior to issuance of its tender offer). In addition, Occidental re-

[18] This history of this litigation is reviewed in *600 California Corp. v. Harjean*, 284 F. Supp. 843 (ND Tex. 1968).

ceived dividends totaling $1,793,439.22. Occidental's total profit was $19,506,419.22 on the shares obtained through its tender offer.

On October 17, 1967, New Kern instituted a suit under § 16 (b) against Occidental to recover the profits which Occidental had realized as a result of its dealings in Old Kern stock. The complaint alleged that the execution of the Occidental-Tenneco option on June 2, 1967, and the exchange of Old Kern shares for shares of Tenneco to which Occidental became entitled pursuant to the merger closed on August 30, 1967, were both "sales" within the coverage of § 16 (b). Since both acts took place within six months of the date on which Occidental became the owner of more than 10% of the stock of Old Kern, New Kern asserted that § 16 (b) required surrender of the profits realized by Occidental.[19] New Kern eventually moved for summary judgment, and, on December 27, 1970, the District Court granted summary judgment in favor of New Kern. *Abrams* v. *Occidental Petroleum Corp.*, 323 F. Supp. 570 (SDNY 1970). The District Court held that the execution of the option on June 2, 1967, and the exchange of Old Kern shares for shares of Tenneco on August 30, 1967, were "sales" under § 16 (b). The Court ordered Occidental to disgorge its profits plus interest. In a supplemental opinion, Occidental was also ordered to refund the dividends which it had received plus interest.

On appeal, the Court of Appeals reversed and ordered summary judgment entered in favor of Occidental. *Abrams* v. *Occidental Petroleum Corp.*, 450 F. 2d 157 (CA2 1971). The Court held that neither the option nor

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[19] Occidental answered asserting various affirmative defenses and counterclaims. Two suits had already been instituted by Old Kern shareholders, and one was subsequently begun. The four suits were consolidated.

the exchange constituted a "sale" within the purview of § 16 (b).[20] We granted certiorari. 405 U. S. 1064 (1972). We affirm.

II

Section 16 (b) provides, *inter alia*, that a statutory insider [21] must surrender to the issuing corporation "any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security [22] of such issuer . . . within any period of less than six months." As specified in its introductory clause, § 16 (b) was enacted "[f]or the purpose of preventing the unfair use of information which may have been obtained by a [statutory insider] . . . by reason of his relationship to the issuer." Congress recognized that short-swing speculation by stockholders with advance, inside information would threaten the goal of the Securities Exchange Act

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[20] In view of its disposition, the Court of Appeals did not reach Occidental's contentions that only the purchases in excess of 10% of Old Kern's stock, rather than all purchases made pursuant to the tender offer, should be included in calculating liability and that the awards of prejudgment interest and dividends were improper. Occidental also appealed from the dismissal of its counterclaims. The Court of Appeals dismissed Occidental's appeal as moot.

[21] For purposes of § 16 (b), a statutory insider includes a "beneficial owner, director, or officer." 15 U. S. C. § 78p (b). The term "beneficial owner" refers to one who owns "more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 781 [§ 12] of this title." 15 U. S. C. § 78p (a).

[22] The term "equity security" is defined to include "any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." 15 U. S. C. § 78c (a) (11).

to "insure the maintenance of fair and honest markets." 15 U. S. C. § 78 (b). Insiders could exploit information not generally available to others to secure quick profits. As we have noted, "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418, 422 (1972). As stated in the report of the Senate Committee, the bill aimed at protecting the public "by preventing directors, officers and principal stockholders of a corporation . . . from speculating in the stock on the basis of information not available to others." S. Rep. No. 792, 73d Cong., 2d Sess., 9 (1934).[23]

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[23] The legislative history of § 16 (b) reveals a congressional effort to curb short-swing trading by insiders whose position gives them access to information not available to the investing public and the ability to influence corporate policy.

"Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." S. Rep. No. 1455, 73d Cong., 2d Sess., 55 (1934).

See also 10 S. E. C. Ann. Rep. 50 (1944); S. Rep. No. 792, 73d Cong., 2d Sess., 9 (1934).

"The Securities Exchange Act of 1934 aims to protect the interests of the public against the predatory operations of directors, officers, and principal stockholders of corporations by preventing them from speculating in the stock of the corporations to which they owe a fiduciary duty.

. . . . .

"By this section [16 (b)] it is rendered unlawful for persons intrusted with the administration of corporate affairs or vested with

Although traditional cash-for-stock transactions that result in a purchase and sale or a sale and purchase within the six-month, statutory period are clearly encompassed within the purview of § 16 (b), the courts have wrestled with the question of inclusion or exclusion of certain "unorthodox" transactions.[24] The statutory definitions

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substantial control over corporations to use inside information for their own advantage." S. Rep. No. 1455, 73d Cong., 2d Sess., 68 (1934).

The purpose and operation of § 16 (b) was explained as follows by one of its draftsmen.

"That [§ 16 (b)] is to prevent directors receiving the benefits of short-term speculative swings on the securities of their own companies, because of inside information. The profit on such transaction under the bill would go to the corporation. You hold the director, irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing." Hearings before Senate Committee on Banking and Currency, 73d Cong., 2d Sess., 6557 (1934). See generally Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 85 (1934); Hearings on S. 84, S. 56, and S. 97 before the Senate Committee on Banking and Currency, 72d Cong., 1st Sess., and 73d Cong., 1st and 2d Sess., 6463–6581 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 7–9 (1934); S. Rep. No. 1455, 73d Cong., 2d Sess., 55–68 (1934); H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13–14 (1934). See also *Blau* v. *Lamb*, 363 F. 2d 507 (CA2 1966); *Smolove* v. *Delendo Corp.*, 136 F. 2d 231 (CA2 1943); Yourd, Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act, 38 Mich. L. Rev. 133 (1939); Meeker & Cooney, The Problem of Definition in Determining Insider Liabilities Under Section 16 (b), 45 Va. L. Rev. 949 (1959); Note, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16 (b) "Purchase or Sale?," 117 U. Pa. L. Rev. 1034 (1969).

[24] The term, see 2 L. Loss, Securities Regulation 1069 (2d ed. 1961), has been applied to stock conversions, exchanges pursuant to mergers and other corporate reorganizations, stock reclassifications, and dealings in options, rights, and warrants.

of "purchase" and "sale" are broad and, at least arguably, reach many transactions not ordinarily deemed a sale or purchase.[25] In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information [26]—thereby endeavoring to implement con-

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[25] "When used in this chapter, unless the context otherwise requires—

. . . . . .

"(13) the terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.

"(14) the terms 'sale' or 'sell' each include any contract to sell or otherwise dispose of." 15 U. S. C. §§ 78c (a)(13), (14).

[26] Several decisions have been read as to apply a so-called "objective" test in interpreting and applying § 16 (b). See, *e. g.*, *Smolove* v. *Delendo Corp.*, 136 F. 2d 231 (CA2), cert. denied, 320 U. S. 751 (1943); *Park & Tilford* v. *Schulte*, 160 F. 2d 984 (CA2), cert. denied, 332 U. S. 761 (1947); *Heli-Coil Corp.* v. *Webster*, 352 F. 2d 156 (CA3 1965). Under some broad language in those decisions, § 16 (b) is said to be applicable whether or not the transaction in question could possibly lend itself to the types of speculative abuse that the statute was designed to prevent. By far the greater weight of authority is to the effect that a "pragmatic" approach to § 16 (b) will best serve the statutory goals. See, *e. g.*, *Roberts* v. *Eaton*, 212 F. 2d 82 (CA2), cert. denied, 348 U. S. 827 (1954); *Ferraiolo* v. *Newman*, 259 F. 2d 342 (CA6 1958), cert. denied, 359 U. S. 927 (1959); *Blau* v. *Max Factor & Co.*, 342 F. 2d 304 (CA9), cert. denied, 382 U. S. 892 (1965); *Blau* v. *Lamb*, 363 F. 2d 507 (CA2 1966), cert. denied, 385 U. S. 1002 (1967); *Petteys* v. *Butter*, 367 F. 2d 528 (CA8 1966), cert. denied, 385 U. S. 1006 (1967). For a discussion and critical appraisal of the various "approaches" to the interpretation and application of § 16 (b), see Lowenfels, Section 16 (b): A New Trend in Regulating Insider Trading, 54 Conn. L. Q. 45 (1969); Note, Stock Exchanges Pursuant to Corporate Consideration: A Section 16 (b) "Purchase or Sale?," 117 U. Pa. L. Rev. 1034 (1969); Note, Reliance Electric and 16 (b) Litigation: A Return to the Objective Approach?, 58 Va. L. Rev. 907

gressional objectives without extending the reach of the statute beyond its intended limits. The statute requires the inside, short-swing trader to disgorge all profits realized on all "purchases" and "sales" within the specified time period, without proof of actual abuse of insider information, and without proof of intent to profit on the basis of such information. Under these strict terms, the prevailing view is to apply the statute only when its application would serve its goals. "[W]here alternative constructions of the terms of § 16 (b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." *Reliance Electric Co.* v. *Emerson Electric Co., supra,* at 424. See *Blau* v. *Lamb,* 363 F. 2d 507 (CA2 1966), cert. denied, 383 U. S. 1002 (1967). Thus, "[i]n interpreting the terms 'purchase' and 'sale,' courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse." *Reliance Electric Co.* v. *Emerson Electric Co., supra,* at 424, n. 4.[27]

In the present case, it is undisputed that Occidental became a "beneficial owner" within the terms of § 16 (b) when, pursuant to its tender offer, it "purchased" more than 10% of the outstanding shares of Old Kern. We must decide, however, whether a "sale" within the ambit of the statute took place either when Occidental became irrevocably bound to exchange its shares of Old Kern for shares of Tenneco pursuant to the terms of the

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(1972); Gadsby & Treadway, "Recent Developments Under Section 16 (b) of the Securities Exchange Act of 1934, 17 N. Y. L. Forum 687 (1971).

[27] Our differences with the dissent as to the reach and scope of congressional intent and purpose are clear. If we are mistaken, or if Congress would now mandate a different result, the statutory remedy would not be difficult to fashion.

merger agreement between Old Kern and Tenneco or when Occidental gave an option to Tenneco to purchase from Occidental the Tenneco shares so acquired.[28]

III

On August 30, 1967, the Old Kern-Tenneco merger agreement was signed, and Occidental became irrevocably entitled to exchange its shares of Old Kern stock for shares of Tenneco preference stock. Concededly the transaction must be viewed as though Occidental had made the exchange on that day. But even so, did the exchange involve a "sale" of Old Kern shares within the meaning of § 16 (b)? We agree with the Court of Appeals that it did not, for we think it totally unrealistic to assume or infer from the facts before us that Occidental either had or was likely to have access to inside information, by reason of its ownership of more than 10% of the outstanding shares of Old Kern, so as to afford it an opportunity to reap speculative, short-swing profits from its disposition within six months of its tender offer purchases.

It cannot be contended that Occidental was an insider when, on May 8, 1967, it made an irrevocable offer to purchase 500,000 shares of Old Kern stock at a price substantially above market. At that time, it owned only 1,900 shares of Old Kern stock, far fewer than the 432,000 shares needed to constitute the 10% owner-

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[28] Both events occurred within six months of Occidental's first acquisition of Old Kern shares pursuant to its tender offer. Although Occidental did not exchange its Old Kern shares until December 11, 1967, it is not contended that that date, rather than the date on which Occidental became irrevocably bound to do so, should control. Similarly, although the option was not exercised until December 11, 1967, no liability is asserted with respect to that event, because it occurred more than six months after Occidental's last acquisition of Old Kern stock.

ship required by the statute. There is no basis for finding that, at the time the tender offer was commenced, Occidental enjoyed an insider's opportunity to acquire information about Old Kern's affairs.

It is also wide of the mark to assert that Occidental, as a sophisticated corporation knowledgeable in matters of corporate affairs and finance, knew that its tender offer would either succeed or would be met with a "defensive merger." If its takeover efforts failed, it is argued, Occidental knew it could sell its stock to the target company's merger partner at a substantial profit. Calculations of this sort, however, whether speculative or not and whether fair or unfair to other stockholders or to Old Kern, do not represent the kind of speculative abuse at which the statute is aimed, for they could not have been based on inside information obtained from substantial stockholdings that did not yet exist. Accepting both that Occidental made this very prediction and that it would recurringly be an accurate forecast in tender-offer situations,[29] we nevertheless fail to perceive how the fruition of such anticipated events would require, or in any way depend upon, the receipt and use of inside information. If there are evils to be redressed by way of deterring those who would make tender offers,

[29] Although a "defensive merger" is one tactic available to incumbent management in its arsenal of anti-tender offer weapons, it is by no means a foregone conclusion that it is the response that will be most often, much less invariably, employed. Incumbent management might, for instance, choose to exhort shareholders not to tender, employ various techniques to elevate the market price of the company's stock in order to make the tender offer less attractive, institute legal proceedings, or increase the company's outstanding stock. Any one of these devices might prove more attractive to incumbent management than a defensive merger which could prove to be highly detrimental to the enterprise. See Note, Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers, 21 Stan. L. Rev. 1104 (1969).

§ 16 (b) does not appear to us to have been designed for this task.

By May 10, 1967, Occidental had acquired more than 10% of the outstanding shares of Old Kern. It was thus a statutory insider when, on May 11, it extended its tender offer to include another 500,000 shares. We are quite unconvinced, however, that the situation had changed materially with respect to the possibilities of speculative abuse of inside information by Occidental. Perhaps Occidental anticipated that extending its offer would increase the likelihood of the ultimate success of its takeover attempt or the occurrence of a defensive merger. But again, the expectation of such benefits was unrelated to the use of information unavailable to other stockholders or members of the public with sufficient funds and the intention to make the purchases Occidental had offered to make before June 8, 1967.

The possibility that Occidental had, or had the opportunity to have, any confidential information about Old Kern before or after May 11, 1967, seems extremely remote. Occidental was, after all, a tender offeror, threatening to seize control of Old Kern, displace its management, and use the company for its own ends. The Old Kern management vigorously and immediately opposed Occidental's efforts. Twice it communicated with its stockholders, advising against acceptance of Occidental's offer and indicating prior to May 11 and prior to Occidental's extension of its offer, that there was a possibility of an imminent merger and a more profitable exchange. Old Kern's management refused to discuss with Occidental officials the subject of an Old Kern-Occidental merger. Instead, it undertook negotiations with Tenneco and forthwith concluded an agreement, announcing the merger terms on May 19. Requests by Occidental for inspection of Old Kern records were sufficiently frus-

trated by Old Kern's management to force Occidental to litigation to secure the information it desired.

There is, therefore, nothing in connection with Occidental's acquisition of Old Kern stock pursuant to its tender offer to indicate either the possibility of inside information being available to Occidental by virtue of its stock ownership or the potential for speculative abuse of such inside information by Occidental. Much the same can be said of the events leading to the exchange of Occidental's Old Kern stock for Tenneco preferred, which is one of the transactions that is sought to be classified a "sale" under § 16 (b). The critical fact is that the exchange took place and was required pursuant to a merger between Old Kern and Tenneco. That merger was not engineered by Occidental but was sought by Old Kern to frustrate the attempts of Occidental to gain control of Old Kern. Occidental obviously did not participate in or control the negotiations or the agreement between Old Kern and Tenneco. Cf. *Newmark* v. *RKO General,* 425 F. 2d 348 (CA2), cert. denied, 400 U. S. 854 (1970); *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (CA2), cert. denied, 332 U. S. 761 (1947). Once agreement between those two companies crystalized, the course of subsequent events was out of Occidental's hands. Old Kern needed the consent of its stockholders, but as it turned out, Old Kern's management had the necessary votes without the affirmative vote of Occidental. The merger agreement was approved by a majority of the stockholders of Old Kern, excluding the votes to which Occidental was entitled by virtue of its ownership of Old Kern shares. See generally *Ferraiolo* v. *Newman,* 259 F. 2d 342 (CA6 1958), cert. denied, 359 U. S. 927 (1959); *Roberts* v. *Eaton,* 212 F. 2d 82 (CA2 1954). Occidental, although registering its opinion that the merger would be beneficial to Old Kern shareholders, did not in fact vote at the

stockholders' meeting at which merger approval was obtained. Under California law, its abstention was tantamount to a vote against approval of the merger. Moreover, at the time of stockholder ratification of the merger, Occidental's previous dealing in Old Kern stock was, as it had always been, fully disclosed.

Once the merger and exchange were approved, Occidental was left with no real choice with respect to the future of its shares of Old Kern. Occidental was in no position to prevent the issuance of a ruling by the Internal Revenue Service that the exchange of Old Kern stock for Tenneco preferred would be tax-free; and, although various lawsuits were begun in state and federal courts seeking to postpone the merger closing beyond the statutory six months period, those efforts were futile. The California Corporation Commissioner issued the necessary permits for the closing that took place on August 30, 1967. The merger left no right in dissenters to secure appraisal of their stock. Occidental could, of course, have disposed of its shares of Old Kern for cash before the merger was closed. Such an act would have been a § 16 (b) sale and would have left Occidental with a prima facie § 16 (b) liability. It was not, therefore, a realistic alternative for Occidental as long as it felt that it could successfully defend a suit like the present one. See generally *Petteys* v. *Butler*, 367 F. 2d 528 (CA8 1966), cert. denied, 385 U. S. 1006 (1967); *Ferraiolo* v. *Newman, supra; Lyman* v. *Livingston*, 276 F. Supp. 104 (Del. 1967); *Blau* v. *Hodgkinson*, 100 F. Supp. 361 (SDNY 1951). We do not suggest that an exchange of stock pursuant to a merger may never result in § 16 (b) liability. But the involuntary nature of Occidental's exchange, when coupled with the absence of the possibility of speculative abuse of inside information, convinces us that § 16 (b) should not apply to transactions such as this one.

IV

Petitioner also claims that the Occidental-Tenneco option agreement should itself be considered a sale either because it was the kind of transaction the statute was designed to prevent or because the agreement was an option in form but in fact a sale. But the mere execution of an option to sell is not generally regarded as a "sale." See *Booth* v. *Varian Associates*, 334 F. 2d 1 (CA1 1964), cert. denied, 379 U. S. 961 (1965); *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Industries*, 309 F. Supp. 75 (Wis. 1970); *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F. Supp. 962 (SDNY 1965). And we do not find in the execution of the Occidental-Tenneco option agreement a sufficient possibility for the speculative abuse of inside information with respect to Old Kern's affairs to warrant holding that the option agreement was itself a "sale" within the meaning of § 16 (b). The mutual advantages of the arrangement appear quite clear. As the District Court found, Occidental wanted to avoid the position of a minority stockholder with a huge investment in a company over which it had no control and in which it had not chosen to invest. On the other hand, Tenneco did not want a potentially troublesome minority stockholder that had just been vanquished in a fight for the control of Old Kern. Motivations like these do not smack of insider trading; and it is not clear to us, as it was not to the Court of Appeals, how the negotiation and execution of the option agreement gave Occidental any possible opportunity to trade on inside information it might have obtained from its position as a major stockholder of Old Kern. Occidental wanted out, but only at a date more than six months hence. It was willing to get out at a price of $105 per share, a price at which it had publicly valued Tenneco preferred on May 19 when the Tenneco-Old Kern agreement was announced.

In any event, Occidental was dealing with the putative new owners of Old Kern who undoubtedly knew more about Old Kern and Tenneco's affairs than did Occidental. If Occidental had leverage in dealing with Tenneco, it is incredible that its source was inside information rather than the fact of its large stock ownership itself.

Neither does it appear that the option agreement, as drafted and executed by the parties, offered measurable possibilities for speculative abuse. What Occidental granted was a "call" option. Tenneco had the right to buy after six months, but Occidental could not force Tenneco to buy. The price was fixed at $105 for each share of Tenneco preferred. Occidental could not share in a rising market for the Tenneco stock See *Silverman* v. *Landa*, 306 F. 2d 422 (CA2 1966). If the stock fell more than $10 per share, the option might not be exercised, and Occidental might suffer a loss if the market further deteriorated to a point where Occidental was forced to sell. Thus, the option, by its very form, left Occidental with no choice but to sell if Tenneco exercised the option, which it was almost sure to do if the value of Tenneco stock remained relatively steady. On the other hand, it is difficult to perceive any speculative value to Occidental if the stock declined and Tenneco chose not to exercise its option. See generally Note, Put and Call Options Under Section 16 of the Securities Exchange Act, 69 Yale L. Rev. 868 (1960); Filer, Understanding Put and Call Options, 96–111 (1959); Leffler, The Stock Market, 363–378 (2d ed. 1957).

The option, therefore, does not appear to have been an instrument with potential for speculative abuse, whether or not Occidental possessed inside information about the affairs of Old Kern. In addition, the option covered Tenneco preference stock, a stock as yet unissued, unregistered, and untraded. It was the value of this

stock that underlay the option and that determined whether the option would be exercised, whether Occidental would be able to profit from the exercise, and whether there was any real likelihood of the exploitation of inside information. If Occidental had inside information when it negotiated and signed the option agreement, it was inside information with respect to Old Kern. Whatever it may have known or expected as to the future value of Old Kern stock, Occidental had no ownership position in Tenneco giving it any actual or presumed insights into the future value of Tenneco stock. That was the critical item of intelligence if Occidental was to use the option for purposes of speculation. Also, the date for exercise of the option was over six months in the future, a period that, under the statute itself, is assumed to dissipate whatever trading advantage that might be imputed to a major stockholder with inside information. See Note, Stock Exchanges Pursuant to Corporation Consolidation: A Section 16 (b) "Purchase or Sale?," 217 U. Pa. L. Rev. 1034, 1054 (1969); *Silverman* v. *Landa*, 306 F. 2d 422 (CA2 1962). By enshrining the statutory period into the option, Occidental also, at least if the statutory period is taken to accomplish its intended purpose, limited its speculative possibilites. Nor should it be forgotten that there was no absolute assurance that the merger, which was not controlled by Occidental, would be consummated. In the event the merger did not close, the option itself would become null and void.

Nor can we agree that we must reverse the Court of Appeals on the ground that the option agreement was in fact a sale because the premium paid was so large as to make the exercise of the option almost inevitable, particularly when coupled with Tenneco's desire to rid itself of a potentially troublesome stockholder. The argument has force, but resolution of the question is very much a

matter of judgment, economic and otherwise, and the Court of Appeals rejected the argument. That court emphasized that the premium paid was what experts had said the option was worth, the possibility that the market might drop sufficiently in the six months following execution of the option to make exercise unlikely, and the fact that here, unlike the situation in *Bershad* v. *McConough*, 428 F. 2d 693 (CA7 1970), the optionor did not surrender practically all emoluments of ownership by executing the option. Nor did any other special circumstances indicate that the parties understood and intended that the option was in fact a sale.[30] We see no satisfactory basis or reason for disagreeing with the judgment of the Court of Appeals in this respect.[31]

The judgment of the Court of Appeals is affirmed.

So ordered.

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[30] In *Bershad* v. *McDonough*, 428 F. 2d 693 (CA7 1970), the defendants were directors and greater-than-ten-percent stockholders of Cudahy Company. The defendants, within six months of their acquisition of beneficial ownership of Cudahy, granted an option to Smelting Refining and Mining Company to purchase their Cudahy stock. The Seventh Circuit held that the grant of the option was a § 16 (b) "sale" of the Cudahy stock. The Court of Appeals in the present case distinguished *Bershad* as follows:

"That case came before the court of appeals on a finding by the district court that, under the circumstances there presented, the stock had in fact been sold within the six months period, although the option was not formally exercised until later. The district court had relied on a number of circumstances, the most significant being that the optionor gave the optionee an irrevocable proxy to vote the shares and that the optionor and one of his associate directors resigned as directors within a few days after the grant of the option and were replaced by officers of the optionee. In other words, the district court found in effect that the 'option' was accompanied by a wink of the eye, and the court of appeals sustained this. Here there is no such finding, and no basis for one." 450 F. 2d, at 165.

[31] With respect to entering judgment for Occidental, the dissent simply has a different, but insufficiently persuasive, view of the facts from that of Judge Friendly and his colleagues.

SUPREME COURT OF THE UNITED STATES

No. 71-1059

Kern County Land Company, Petitioner, *v.* Occidental Petroleum Corporation.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 7, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

The Court, in resorting to an *ad hoc* analysis of the "possibility for the speculative abuse of inside information," charts a course for the interpretation of § 16 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p (b), that in my mind undermines the congressional purpose. I respectfully dissent.

I

"The statute is written broadly, and the liability it imposes is strict." *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418, 431 (DOUGLAS, J., dissenting). Except for narrowly drawn exceptions, it is all-inclusive.[1] The operative language provides:

> ". . . any profit realized by [a beneficial owner, director, or officer] from *any purchase and sale*, or

[1] Section 16 (b) provides in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer [other than an exempted security] within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverably by the issuer, irrespective of any intention on the part of such beneficial owner, director, or

> any sale and purchase, of any equity security of such issuer [other than an exempted security] *within any period of less than six months,* unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, *irrespective of any intention* on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months."

By its own terms, the section subsumes *all* transactions that are technically purchases and sales and applies irrespective of any actual or potential use of inside information to gain a trading advantage. See *Feder* v. *Martin-Marietta Corp.*, 406 F. 2d 260, 262 (CA2 1969). The conclusion seems inescapable that Occidental Petroleum Corporation (Occidental) purchased and sold shares of Kern County Land Company (Old Kern) within a six-month period and that this "round trip" in Old Kern Stock is covered by the literal terms of § 16 (b).

Occidental, pursuant to a cash tender offer, acquired in excess of 880,000 shares of Old Kern during May and

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officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exmept as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p (b).

June 1967. It is undisputed that these acquisitions were purchases within the meaning of the section.[2] On August 30, 1967, Old Kern sold its assets to a newly formed subsidiary of Tenneco Corporation, Kern County Land Company (New Kern), in exchange for cumulative convertible preference stock of Tenneco, Inc. (Tenneco), Tenneco Corporation's parent. Old Kern was dissolved in October 1967 (within six months of the tender offer), and each shareholder became irrevocably entitled to receive share-for-share for his Old Kern stock the cumulative convertible preference stock of Tenneco.

The question presented to us is whether this exchange of shares constituted a "sale" of the Old Kern shares. The term "sale," as used in the Securities Exchange Act, includes "any contract to sell or otherwise dispose of." 15 U. S. C. § 78c (a)(14) (emphasis added). Clearly, Occidental "disposed" of its Old Kern shares through to Old Kern-Tenneco consolidation. Its status as a shareholder of Old Kern terminated, and it became instead a shareholder of Tenneco, privy to all the rights con-

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[2] The term "purchase" includes "any contract to buy, purchase, or otherwise acquire." 15 U. S. C. § 78c (a)(13). A "beneficial owner" is one who owns "more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* [§ 12] of this title." *Id.*, § 78p (a). The District Court held that "[t]he tender offer constituted a single act of Occidental, whereby the company became a beneficial owner of more than 10 per cent of Old Kern's capital stock." 323 F. Supp. 570, 579. Thus, the District Court ruled that the profit made on all stock purchased in the tender offer, not only the profit on the purchases in excess of 10%, would have to be surrendered. The Court of Appeals did not reach this issue.

[3] This is not a case where the stock surrendered and the stock received in the exchange were economic equivalents. Cf., *e. g.*, *Blau* v. *Lamb*, 363 F. 2d 507, 523–525 (CA2 1966); *Blau* v. *Max Factor & Co.*, 342 F. 2d 304, 308–309 (CA9 1965).

An exchange of securities in different companies is a "purchase" or "sale" for purposes of § 10 (b). *E. g.*, *SEC* v. *National Securities*,

ferred by the Tenneco shares.[3] See *Newmark* v. *RKO General*, 425 F. 2d 348 (CA2 1970); *Park & Tilford* v. *Schulte*, 160 F. 2d 984 (CA2 1947).[4] In my view, we need look no further. As my Brother BLACKMUN, then Circuit Judge, stated in dissent in *Petteys* v. *Butler*, 367 F. 2d 528, 538 (CA8 1966):

> "My own reaction is that either the statute means what it iliterally says or that it does not; that if the Congress intended to provide additional exceptions, it would have done so in clear language; and that the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process."

The majority finesses the literal impact of § 16 (b) by examining Occidental's willfulness and its access to inside information. In concludes: "But the involuntary nature of Occidental's exchange, when coupled with the absence of the possibility of speculative abuse of inside information, convinces us that § 16 (b) should not apply to transactions such as this one." *Ante*, at —. This approach is plainly contrary to the legislative purpose.

The purpose of § 16 (b) is stated in its preamble: ". . . preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the

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Inc., 393 U. S. 453; *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262 (CA7 1967).

[4] Judge Clark, in *Park & Tilford* v. *Schulte*, adopted a straightforward approach to defining "acquisition": "defendants did not own the common stock in question before they exercised their option to convert; they did afterward. Therefore the acquired the stock, within the meaning of the Act." 160 F. 2d, at 987. The same analysis holds for "disposition."

issuer . . . ." The congressional investigations that led to the enactment of the Securities Exchange Act revealed widespread use of confidential information by corporate insiders to gain an unfair advantage in trading their corporations' securiti .[5] Unlike other remedial provisions of the Act, the most noteworthy being § 10 (b), 15 U. S. C. § 78j (b), Congress drafted § 16 (b) as an objective rule, designed to have a clearly "prophylactic" effect. *Blau* v. *Lehman*, 368 U. S. 403, 414. See *Heli-Coil Corp.* v. *Webster*, 352 F. 2d 156, 165–166 (CA3 1965); *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 235 (CA2 1943). As Thomas Corcoran, a principal draftsman of the Act, explained to Congress:

> "You hold the director, irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing."[6]

In *Reliance Electric, supra*, the Court noted that "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a *class of transactions* in which the possibility of abuse was believed to be intolerably great." 404 U. S., at 422 (emphasis added). Certainly, mergers are such a class of transactions.[7] In *Newmark* v. *RKO General, Inc., supra*, for example, RKO signed an option contract to

[5] Examples of this practice are chronicled elsewhere. See, *e. g.*, *Reliance Electric Co.* v. *Emerson Electric Co., supra*, at 429–430 and nn. 3–6 and sources cited therein. It would serve no purpose to recount them here.

[6] Hearings before Senate Committee on Banking and Currency, 73d Cong., 2d Sess., 6557 (1934).

[7] See Comment, 84 Harv. L. Rev. 1012, 1018 (1971).

purchase shares of the company which was to be merged into a subsidiary of RKO. When the merger was approved by the necessary parties, RKO exercised its option and the merger was consummated. The court found that RKO "not only acquired knowledge of what would transpire but also could exercise substantial influence over the course of events." *Id.*, at 353. "In sum," the court concluded, "the purchase and subsequent exchange of Central shares were fraught with opportunities for the kind of speculative abuse section 16 (b) was intended to abort." *Id.*, at 354.

The Securities and Exchange Commission has resisted a rule that would exempt mergers as a class from the operation of § 16 (b). It responded as follows to a proposal of the Special Committee on Securities Regulation of the Association of the Bar of the City of New York: [*]

> "We concluded, however, that removing the 'teeth' of Section 16 (b) to discourage the use of inside information would allow insiders to create and take advantage of speculative opportunities during the time surrounding such significant corporate events which outweighed this potential conflict. Also, we know that some persons are unwittingly caught by the section in these as in other situations falling within the provisions of Section 16 (b), but in our opinion the public interest and the interest of investors are better served in this area by the unrestricted operation of the section."

It is true that in some cases an insider may be required to disgorge profits even though his transactions do not lend themselves to the abuses that underlay the enactment of § 16 (b). The draftsmen carefully weighed this eventuality and opted for a bright-line rule. As Thomas Corcoran stated: "You have to have a general rule. In

[*] Letter of November 24, 1965.

particular transactions it might work a hardship, but these transactions that are a hardship represent the sacrifice to the necessity of having a general rule." [9]

The very construction of § 16 (b) reinforces the conclusion that the section is based in the first instance [10] on a totally objective appraisal of the relevant transactions.[11] See *Smolowe* v. *Delendo Corp.*, *supra*, at 236. Had the draftsmen intended that the operation of the section hinge on abuse of access to inside information it would have been anomalous to limit the section to purchases and sales occurring within six months.[12] Indeed, the purpose of the six-month limitation, coupled with the definition of an insider, was to create a *conclusive presumption* that an insider who turns a short-swing profit in the stock of his corporation had access to inside information *and* capitalized on that information by speculating in the stock. But, the majority departs from the benign effects of this presumption when it assumes that it is "totally unrealistic to assume or infer from the facts before us that Occidental either had or was likely to have access to inside information . . . ." *Ante*, at —. The majority abides by this assumption even for that period after which Occidental became a 10% shareholder and then extended its tender offer in order to purchase additional Old Kern shares.

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[9] Hearings, *supra*, n. 6, at 6558.

[10] The objective approach may have to yield to a more flexible interpretation of the terms "purchase" and "sale" to include transactions which present the evil Congress sought to eliminate or transactions which are designed to evade § 16 (b). See discussion *infra*.

[11] The preamble of the section, which expresses the purpose of the section, was intended to aid in establishing the constitutionality of the section and guiding the Commission's rulemaking authority. See *Smolowe* v. *Delendo Corp.*, *supra*, at 236; 2 L. Loss, Securities Regulation 1041 (2d ed. 1961).

[12] In addition, there would have been no reason to exempt transactions wherein the "security was acquired in good faith in connection with a debt previously contracted . . . ."

The majority takes heart from those decisions of lower federal courts which endorse a "pragmatic" approach to § 16 (b). Many involved the question whether a conversion of one security of an issuer into another security of the same issuer constituted a purchase or a sale.[13] It would serve no purpose to parse their holdings because, as Louis Loss describes, they have a "generalization-defying nature." [14] In 1966 the Securities and Exchange Commission exercised its exemptive power under § 16 (b) to adopt Rule 16b–9,[15] which under specified conditions excludes a conversion from the operation of § 16 (b). This rule will relieve the courts of much of the burden that has developed from *ad hoc* analysis in this narrow area. But, by sanctioning the approach of these cases, the majority brings to fruition Louis Loss's prophecy that they will "continue to rule us from their graves," [16] for henceforth they certainly will be applied by analogy to the area of mergers and other consolidations.

Thus, the courts will be caught up in an *ad hoc* analysis of each transaction, determining both from the economics of the transaction and the *modus operandi* of the insider whether there exists the possibility of speculative abuse of inside information. Instead of a section that is easy to administer and by its clear-cut terms discourages litigation, we have instead a section that fosters litigation because the Court's decision holds out the hope for the insider that he may avoid § 16 (b) liability. In short, the majority destroys much of the section's prophylactic effect. I would be the first to agree that "[e]very transaction which can be reasonably defined as a purchase

[13] See, *e. g.*, *Roberts* v. *Eaton*, 212 F. 2d 82 (CA2 1954); *Ferraiolo* v. *Newman*, 259 F. 2d 342 (CA6 1958); *Blau* v. *Max Factor & Co.*, *supra*; *Blau* v. *Lamb*, *supra*; *Petteys* v. *Butler*, *supra*.

[14] 5 L. Loss, Securities Regulation 3027 (Supp. to 2d ed. 1969).

[15] Sec. Exch. Act Rel. 7826.

[16] 5 L. Loss, Securities Regulation 3027 (Supp. to 2d ed. 1969).

[should] be so defined, if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16 (b)." *Ferraiolo* v. *Newman*, 259 F. 2d 342, 345 (CA6 1958) (STEWART, J.). See also *Reliance Electric Co.* v. *Emerson Electric Co.*, *supra*, at 424. Certainly we cannot allow transactions which present the possibility of abuse but do not fall within the classic conception of a purchase or sale escape the confines of § 16 (b). It is one thing to interpret the terms "purchase" and "sale" liberally in order to include those transactions which evidence the evil Congress sought to eliminate; it is quite another to abandon the bright-line test of § 16 (b) for those transactions which clearly fall within its literal bounds. Section 16 (b), because of the six-month limitation, allows some to escape who have abused their inside information. It should not be surprising, given the objective nature of the rule, if some are caught unwillingly.

In *Reliance Electric*, *supra*, at 422, the Court quoted with approval the following language from *Bershad* v. *McDonough*, 428 F. 2d 693, 696 (CA7 1970):

> "In order to achieve its goals, Congress chose a relatively arbitrary rule capable of easy administration. The objective standard of Section 16 (b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation. This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect."

It is this "objective standard" that the Court hung to so tenaciously in *Reliance Electric*, but now apparently would abandon to a large extent. In my view the Court

improperly takes upon itself the task of refashioning the contours of § 16 (b) [17] and changing its essential thrust.

II

Although I conclude that the judgment below should be reversed on the grounds that the exchange of shares constituted a sale, I could not conclude that it was proper for the Court of Appeals to direct entry of summary judgment in favor of Occidental even if I accepted the majority approach to § 16 (b). It did this notwithstanding the failure of Occidental to move for summary judgment in the District Court. To say the least, this is an extraordinary procedure.[18] Even if it can be justified in the most limited circumstances—for example, where the record below left no doubt whatsoever that the nonmoving party was entitled to summary judgment as a matter of law—this is not such a case.

The District Court concluded that "[i]n consequence of the option agreement, Occidental disposed of its holdings in Old Kern stock at a profit of about $20 per share . . . . This profit falls within the meaning of Section 16 (b) . . . ." 323 F. Supp., at 579–580. Since the actual sale pursuant to the exercise of the option did not occur within the six-month period, the only reasonable interpretation of this conclusion of law is that the District Court found that the execution of the option was in fact and substance a sale. The majority does not contest that an option agreement may be in economic

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[17] Occidental unsuccessfully sought to have the Securities and Exchange Commission adopt a rule which would have exempted this exchange. No inferences should be drawn from this refusal. But, I do believe that given the structure and policies of § 16 (b), any "exempting" is best left to the Commission and Congress. See *Heli-Coil Corp.* v. *Webster*, *supra*, at 165–166.

[18] See generally 6 J. Moore, Federal Practice ¶ 56.12.

reality a sale. See *Bershad* v. *McDonough, supra.* It distinguishes but does not reject *Bershad.* Rather, the majority can "see no satisfactory basis or reason for disagreeing" with the Court of Appeals, which concluded that there is "no basis" for a finding that Occidental's Old Kern stock was "sold" upon execution of the option.[19] I cannot agree.

In *Bershad,* the defendants, who had purchased approximately 18% of the outstanding shares of Cudahy Company at $6.75 per share, executed an option obligating themselves to sell the shares at $9 per share. The market price of the shares was then $9.125. The optionee paid $350,000 (14% of the purchase price) for the option, to be applied against the purchase price in the event of exercise and forfeited in the event of nonexercise. In addition, defendants gave the optionee an irrevocable proxy with respect to the optioned stock, and defendant McDonough and his colleagues resigned from the Cudahy board of directors. The Court of Appeals also found that "[t]he circumstances of the transaction clearly indicate that the stock was effectively transferred, for all practical purposes, long before the exercise of the option." *Id.,* at 698.

By comparison, the exercise price here was $105, and the premium to secure the option was $10 per share, or $8,866,230, also to be credited against the purchase price if the option were exercised and forfeited in the event of nonexercise if the merger was consummated. Thus, the effective exercise price was nearly 10% below the estimated value of the Tenneco shares to be received in

[19] The Court of Appeals also concluded that the District Court had made no such finding. For the reasons indicated above, I do not agree. In any event, I presume that the Court of Appeals, had it confronted such a finding, would have determined that it was clearly erroneous.

the consolidation.[20] When the option was executed, Occidental's attorney was authorized to vote Occidental's Old Kern shares in favor of the Tenneco acquisition, and it was not until it was apparent that Occidental's vote was not needed that Occidental's attorney was relieved of his obligation. Occidental also abandoned its demand for two seats on Old Kern's board, as well as its litigation for inspection of Old Kern's books and records.

In concluding that this case was not controlled by *Bershad*, the Court of Appeals emphasized the undisputed testimony[21] that the forfeitable down payment was a reasonable, noncoercive price. The basis for this was the deposition of one of Occidental's vice presidents stating that a New York investment firm had advised him that $9 to $12 per share was a reasonable premium for an option on stock selling at $95. This deposition should not suffice to support summary judgment. First, it is not clear what assumptions the investment firm had made in giving this advice. Second, while it may be that $10 per share premium was a reasonable price for an option based upon factors available to the general investing public, it is by no means clear that an option executed by two parties privy to inside information should

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[20] Respondent argues that unlike *Bershad*, the effective exercise price was not below the current market value because the Old Kern shares never sold for more than $94.75. It contends that this trading price reflected the Kern board's acceptance of the proposed consolidation. But, it is common for a stock which may be exchanged to sell at a discount from the stock to be received until the exchange becomes a certainty. This discount reflects the risk that the exchange may not be consummated. The option agreement provided that the premium would be returned if there were no exchange. Thus, we must appraise this transaction on the assumption that the consolidation would be approved and accomplished.

[21] Petitioner contends here that it did not believe that it was necessary to rebut this hearsay testimony in order to prevail on its motion for summary judgment; moreover, it was not faced with a cross-motion.

be judged on the same terms.[22] It may be that under the circumstances present here the eventual exercise of the option was a "sure thing." In short, Occidental may have known that it was "locked into" a $17 million profit.[23] Finally, it has not been determined what effect, if any, the very size of the down payment—nearly $9 million—had on the eventual exercise. With these uncertainties and in view of the holding of the District Court that the option agreement constituted a sale, at the very least the case should have been remanded to the District Court for a hearing on whether the terms of the option "compelled" its exercise. See *Mourning* v. *Family Publications Service, Inc.*, — U. S. —, — (DOUGLAS, J., dissenting); *White Motor Co.* v. *United States*, 372 U. S. 253, 263; 6 J. Moore, Federal Practice ¶ 56.12, at 2243.

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[22] Although Occidental may not have been Tenneco's "ally," as the majority indicates, it was in their mutual interest to arrange for a satisfactory option agreement.

[23] Shortly after the option was exercised, Armand Hammer, the President of Occidental, commented on the profit of $17 million that Occidental expected. In his mind, it was not "bad for two weeks' work."